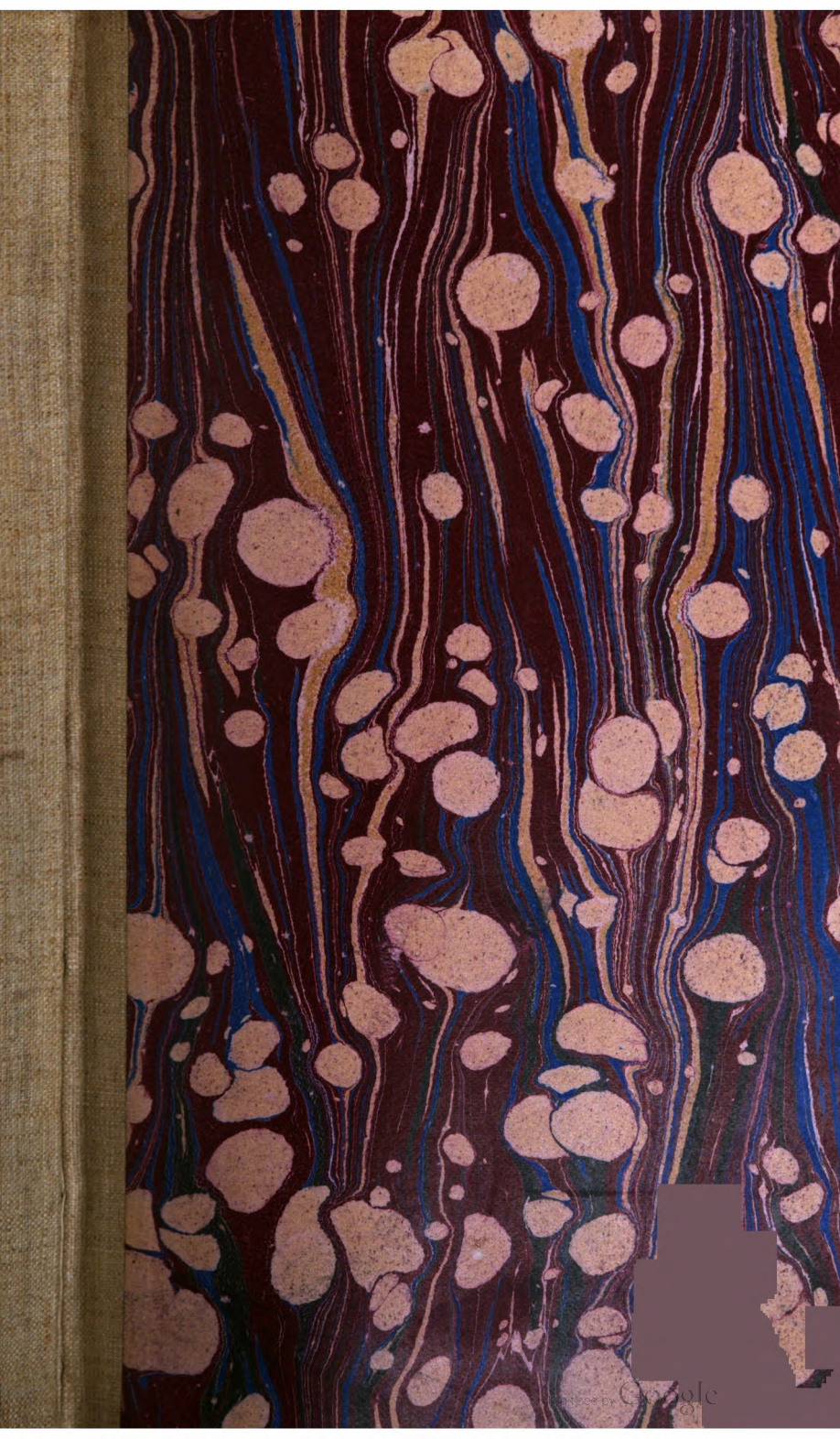

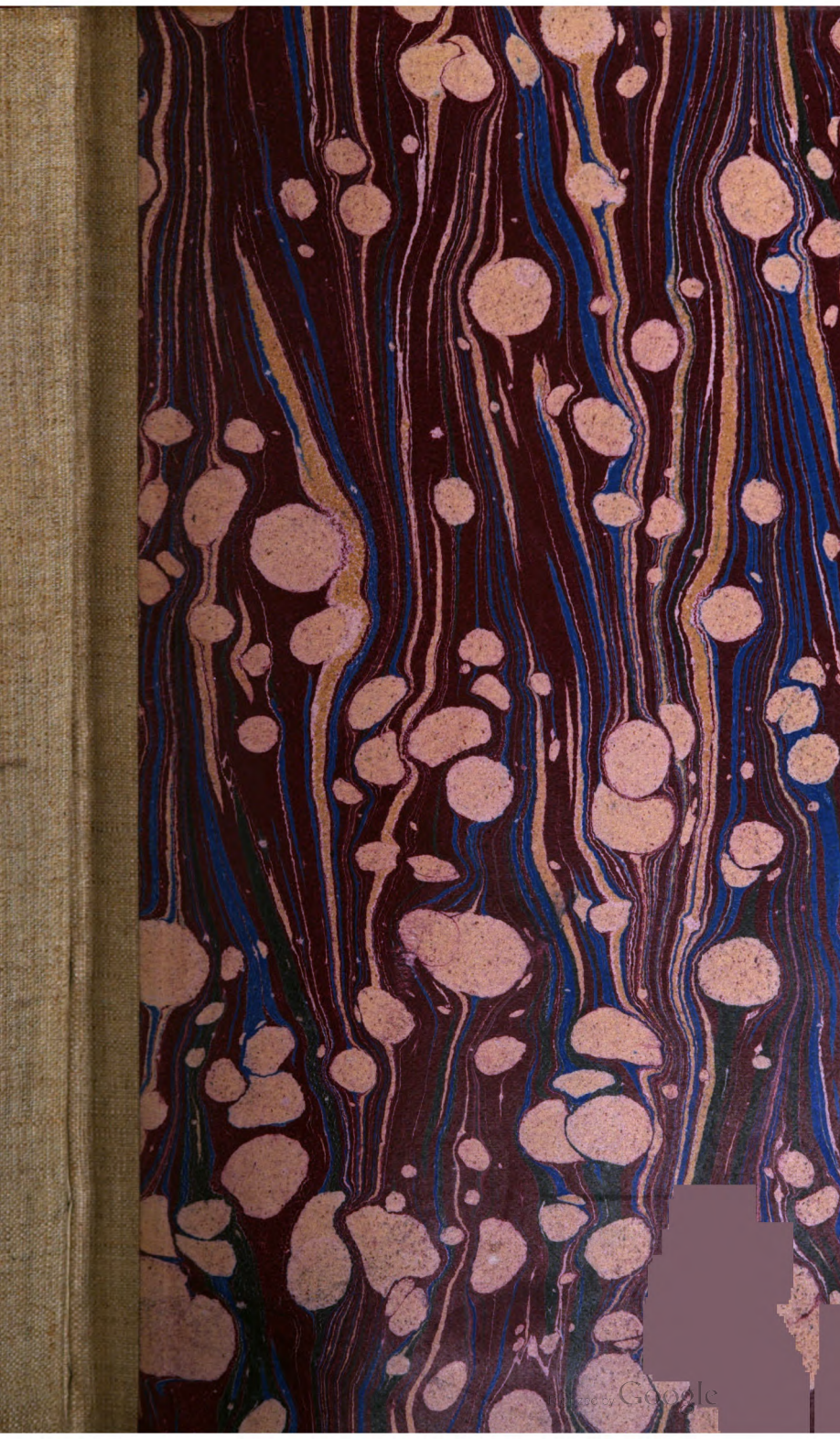

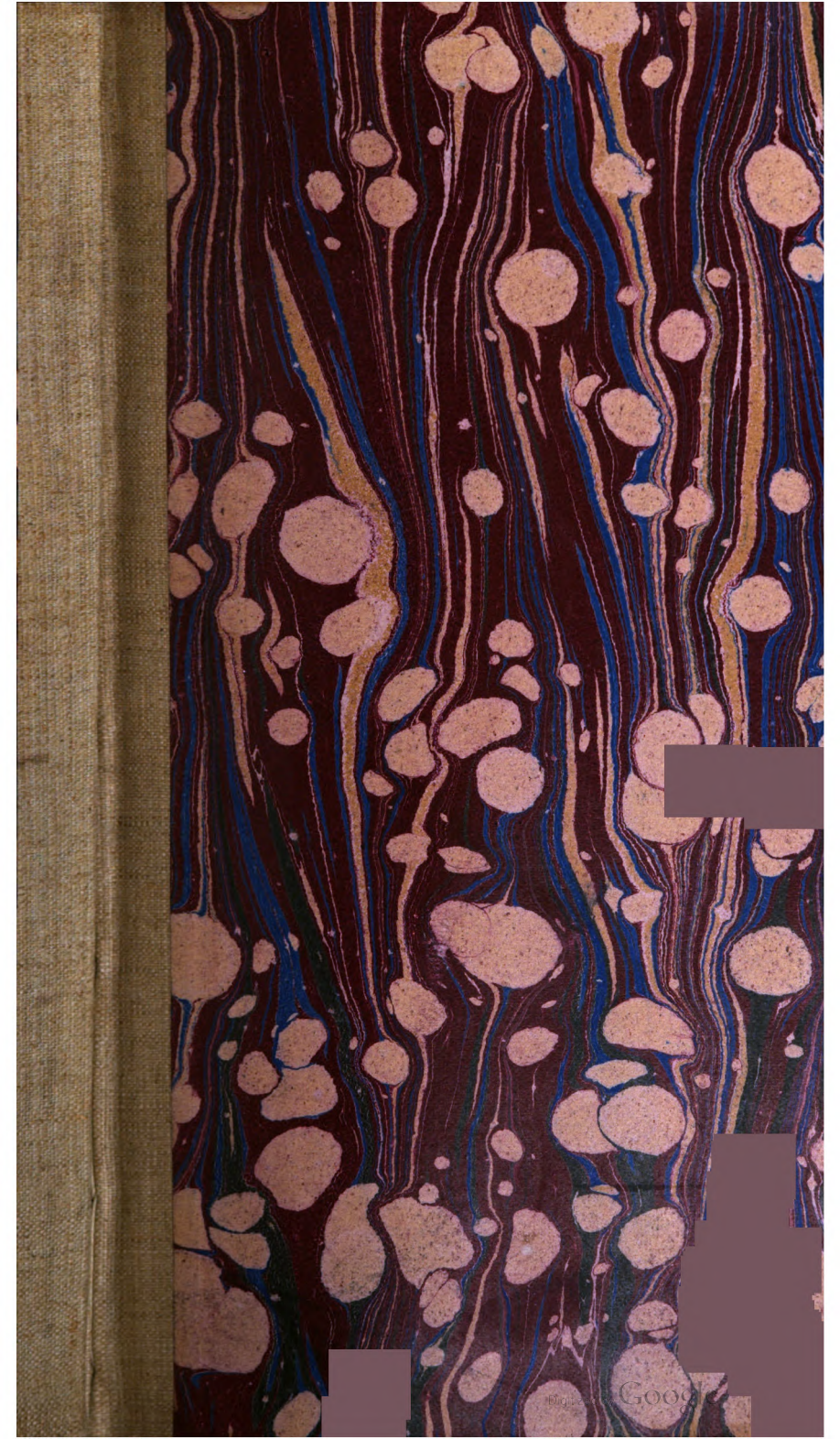

A DIGEST

OF THE

LAW OF EASEMENTS.

BY

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PREFACE

TO THE

SEVENTH EDITION.

SINCE the last Edition of my Work was published, in January, 1900, several important cases of Easements have come before the Courts. They will be found noticed under appropriate headings in this new Edition.

I beg to offer my thanks for the several criticisms of my Work on the appearance of the 5th and 6th Editions. Suggestions made have been considered, and followed where it appeared desirable and practicable to do so.

This Edition has been carefully prepared, and I trust it may merit the approval of the profession, and especially of Students of the Law.

L. C. INNES.

SEVENOAKS,
September, 1903.

EXTRACT FROM

PREFACE TO FIRST EDITION.

PUBLISHED IN MADRAS IN 1878.

* * * * *

I have omitted what are called customary Easements, as they are either not Easements properly so called, or, if Easements, are so by prescription, and not by custom, and are properly classed as Easements by Prescription.

I have added a Section on Licenses, as is usual in treatises upon Easements. The subject is related to that of Easements, and each tends to throw light upon the other. Rights usually styled Rights *ex jure naturæ* are also treated of, though they are not easements, for a similar reason.

* * * * *

The Digest is founded principally upon the treatises of Gale and Goddard. I have quoted most of the cases which are of more recent date than the latter work.

I trust that the labour (which has not been light) of preparing this Digest may not have been altogether thrown away, and that the work may prove of use to the profession and the public.

MADRAS, 1878.

TABLE OF CONTENTS.

	PAGE
PREFACE	iii
TABLE OF CONTENTS	v
NAMES OF CASES CITED	xiii

SERVITUDES	1, 2
include profits *à prendre* and Easements ..	2
EASEMENTS (generally)	2
Permanence of tenement required in ..	2
by express grant	2
public	2
private	3
by implied grant	3
by express or implied reservation ..	3
by prescription	
at Common Law	3
by Statute	3
Application of the terms "dominant" and "servient"	3
Kinds of easements	3—6
Illustrations	4, 5
The use of the dominant holder must be continuous, or perpetually recurring ..	6
Tenants as dominant and servient holders	6, 7
Who may acquire easements	7, 8, 9

	PAGE
ACQUISITION OF EASEMENTS	
by express grant	9
by implied grant	10—20
Quasi easements	10—11
Illustrations	11
Easements arising on severance of tenements	12—20
Illustrations	15—20
ACQUISITION OF EASEMENTS BY PRESCRIPTION ..	21—48
PRESCRIPTION AT COMMON LAW	21—26
What it is	21
For what period user must have been had	21
In what cases there cannot be prescription at Common Law	22, 23
Illustrations	24, 25
Easements of light and water, how restricted	25
Enjoyment must be continuous	26
Effect of the suspension of user temporarily by agreement	26
PRESCRIPTION UNDER THE PRESCRIPTION ACT ..	26—48
An Action essential to acquisition of right	26, 27
What easements can be acquired ..	27
Nature of enjoyment required	28
Note and tabulated opinions of the judges in *Dalton* v. *Angus*	28—33
In whose name claim may be made ..	34
Extent of enjoyment required	34
"Without interruption," meaning of ..	34, 35
"As of right," meaning of	34
What are not interruptions under the Act	35
Submission, how negatived	35
How claim may be defeated	36—37

PRESCRIPTION UNDER THE PRESCRIPTION ACT—*contd.* PAGE
Effect of enjoyment as of right for forty years without interruption 38
Exception in the case of a claim to an easement of light 38
Effect of fluctuating interruption .. 39
"Access of light," meaning of 40
2nd, 3rd, 4th, 7th and 8th Sections of the Act, with Illustrations .. .. 38—44
Where interruption of enjoyment by reasonable means has not been possible .. 44, 45
Incapacity of servient owner, how affecting acquisition 46, 47
Meaning of "actually enjoyed by any person claiming right thereto" in 2nd Section 47, 48

OF THE CLASSES OF NATURAL RIGHTS, AND RIGHTS IN EASEMENTS .. .. .. 48—80

WATER—Rights *ex jure naturæ* in .. .. 48—54
Nature of right to the reasonable use of water in natural streams .. .. 48—50
Natural right to accustomed flow in natural streams 50, 51
to purity of water in natural streams 52, 53
in artificial streams .. 52, 53
to get rid of or appropriate surface water 53, 54
Easements in .. .. .. 54—59
generally .. .. .. 54—57
Right to obstruct and divert .. .. 57—58
pollute 58
Other rights may be the subject of grant.. 58—59

WAY—Rights of .. .. 59—66
Public rights of 59

WAY—*continued*	PAGE
Private rights of	59—66
To whom they appertain, and for what purpose	60
Extent of easement of—as to purpose or period, or mode of user	60, 61
Rights of—by express grant	62
implied do.	63—66
Distribution of right of—on severance of tenement to which it is appurtenant ..	63
Conveniences of—which had been used between two portions of the same tenement, would not, prior to the Conveyancing Act of 1881, on severance pass to vendee unless they were necessary, or unless it was expressed that they were intended to be conveyed. Effect of the Act ..	63
When a way of necessity is implied ..	63, 64
not implied ..	64
through tenement of stranger ..	64
Right of—when impliedly reserved ..	64, 65
Where right of—is rendered incapable of use by the act of the grantor.. ..	65, 66
No acquisition is possible of private right over public road	66
AIR—Natural right to uninterrupted flow of ..	67
to receive vertically ..	67
to free enjoyment and use of air received	67
Right to purity of—independent of easement	67
Qualifications of natural right to purity of air	67, 68
EASEMENTS in air	68, 69

PAGE

SUPPORT—Natural right to support of one's land by the adjacent land 70
Extent of this right before and after erection of buildings 70, 71
Easement of—of buildings by adjacent soil must be by grant or prescription .. 72
Right of easement of—of buildings by soil, and of buildings by buildings, in what cases may be implied 73, 74
In absence of right of—there may be a duty to take care in removing a contiguous building 74
No extension of obligation of, in favour of one who has contributed to the subsidence of his own buildings 74

LIGHT .. .. 74—80
Natural right to—arising by situation .. 74
received vertically .. 74
laterally .. 75
Easement of, what it consists in .. 75
Easements of, by express grant .. 76
by implied grant .. 76—80
by prescription .. 76, 78—80
Measure of the right to 79
Liability of tenants for obstructing .. 80

EXTENT OF USER OF EASEMENTS .. .. 80—87
when grant is partly in conflict with statute 80
by deed 81
for general purposes .. 82
Distribution of, on severance of tenement .. 82, 83
of right of way 83
by prescription, extent of right, how determined .. .. 83—87

INCIDENTS OF EASEMENTS 88, 89

PAGE

EXTINGUISHMENT OF EASEMENTS .. .. 89—102
by Act of Parliament 89
Modes in which easements may be lost .. 90—102
by express release 91
merger .. .. 91—94
cessation of purpose 94
cessation of necessity 94, 95
alteration of mode of enjoyment .. 95—97
necessary consequence of act of the dominant owner 98
abandonment .. .. .. 98—101
Licence 102

DISTURBANCE OF RIGHTS ARISING BY SITUATION AND OF RIGHTS OF EASEMENT, what they are..102—108
The nature of rights to transmit—
impure air,
impure water,
disagreeable noises,
into the adjacent property. 102
Right not acquired if neither interruption nor legal proceedings be possible ..102—103
Nuisances in the obstruction of natural rights and easements 103

DISTURBANCES OF NATURAL RIGHTS OR RIGHTS OF EASEMENT
are actionable without showing special damage 104, 106
Abatement of nuisances 106, 107
When right of action accrues to reversioner 108

OF CAPACITY .. ..109—115
of dominant owner to ACQUIRE an easement 109, 110
of servient owner to GRANT an easement .. 111

OF CAPACITY—*continued.* PAGE

Effect of servient owner's incapacity to consent 112
Non-effect of this in the case of LIGHT ..112—115
Incapacity subsequent to the starting point for the prescriptive period does not rebut presumption, but entails deduction from period of enjoyment 113
When during the user resistance has been impossible, a grant cannot be presumed (1).. 114
unless there has been subsequent consent.. 114
so, also, if there has been no knowledge of the user (2) 115
(1) and (2) do not apply to statutory rights of LIGHT 115

OF LICENSES—How a license is distinguished from an easement 116
What a license as to personal things is .. 116
When a parol license is void 117
A parol license is countermandable .. 117
Exceptions (1) 117
(2) 117, 118, 119
Though executed, countermandable in other cases 119, 120

INDEX 121

NAMES OF CASES CITED.

PAGE

Aldin *v.* Latimer, Clark, Muirhead & Co. (1894) 69
Aldred's Case (1738) 5, 67
Allen *v.* Allen (1841) 111
Allen *v.* Taylor (1880) 16, 77, 78
Angus, Dalton *v.* (1881) ... 5, 6, 21, 23, 27, 28, 30 to 33, 34, 70, 72, 73, 76
Arkwright *v.* Gell (1839) 2, 25, 46, 56
Arnold *v.* Jefferson (1697) 80
Attorney-General *v.* Corporation of Plymouth (1846) ... 81

Bailey *v.* Clark (1902) 49, 52, 55, 58
Bailey *v.* Icke (1891) 77
Ballard *v.* Dyson (1808) 61
Ballard *v.* Tomlinson (1885) 52, 53, 104
Bamford *v.* Turnley (1860) 67, 105
Barkshire *v.* Grubb (1881) 63
Barlow *v.* Rhodes (1833) 63
Barlow *v.* Ross (1890) 90
Bass *v.* Gregory (1890) 68, 69
Battersea (Lord) *v.* Commissioners of Sewers, London (1896) 43
Battishill *v.* Reed (1856) 107
Bayley *v.* Great Western Rail. Co. (1884) 63
Bealey *v.* Shaw (1805) 57, 58
Beddington *v.* Atlee (1887) 8, 9, 77
Beeston *v.* Weate (1856) 56
Bell *v.* Earl of Dudley (1895) 70
Bewley *v.* Atkinson (1879) 39
Birmingham, Dudley and District Banking Co. *v.* Ross (1888) 77
Blackett *v.* Bradley (1862) 24, 45
Blanchard *v.* Bridges (1855) 86, 87
Bland *v.* Mosely (1587) 5

PAGE

Bliss *v.* Hall (1838) 103, 105
Bonner *v.* Great Western Rail. Co. (1883) 75
Bonomi *v.* Backhouse (1859) 32, 71
Booth *v.* Alcock (1873) 7
Bower *v.* Hill (1835) 63, 82
Bowry & Pope's Case (1587) 76
Bradburn *v.* Morris (1876) 61, 84
Bradford Corporation *v.* Pickles (1896) 53
Broadbent *v.* Ramsbotham (1856) 49, 54
Bromfield *v.* Williams (1897) 20
Buckley *v.* Buckley (1898) 53
Burrows *v.* Lang (1901) 56

Chadwick *v.* Trower (1839) 74
Chambres Colliery Co. *v.* Hopwood (1886) 7
Chandler *v.* Thompson (1811) 86, 87
Chasemore *v.* Richards (1859) 51
Chastey *v.* Ackland (1897) 69
Clarke *v.* Somersetshire Drainage Commrs. (1888) ... 96
Clayton *v.* Corby (1842) 44
Clifford *v.* Hoare (1874) 62
Cocker *v.* Cowper (1834) 117
Codling *v.* Johnson (1829) 63, 82
Colchester *v.* Roberts (1839) 62
Collins *v.* Slade (1874) 81
Collis *v.* Laugher (1894) 40
Constable *v.* Nicholson (1863) 8
Cooke *v.* Ingram (1893) 61, 65
Cooper *v.* Crabtree (1882) 108
Cooper *v.* Straker (1889) 37
Coppey *v.* J. de B. (1496) 15
Corbett *v.* Hill (1870) 74
Corbett *v.* Jonas (1892) 76, 82
Cornish *v.* Abingdon (1859) 101
Cortauld *v.* Legh (1869) 40
Coutts *v.* Gorham (1829) 76
Cowling *v.* Higginson (1838) 61
Crossley *v.* Lightowler (1867) 68, 84, 105
Crump *v.* Lambert (1867) 67, 69

PAGE

Dalton *v.* Angus (1881) ... 5, 6, 21, 23, 27, 28, 30—33, 34, 70, 72, 73, 76
Dame Brown's Case, Moore *v.* Brown (1572) 20
Davies *v.* Sear (1869)... 64
Davies *v.* Williams (1887) 107
Dodd *v.* Burchell (1862) 11, 18
Doe *v.* Hilder (1819) 101
Doe *v.* Wood (1819) 119
Dudden *v.* Guardians of the Clutton Union (1857) ... 49
Dyers' Co. *v.* King (1870) 80

Earl of Westmoreland *v.* The New Sharlston Collieries Co. (1899) 70
Easton *v.* Isted (1903) 39, 79
Edinburgh and District Water Trustees *v.* Clippens Oil Co. (1901) 71
Elliotson *v.* Feetham and another (1835) ... 69, 103, 105
Embrey *v.* Owen (1851) 49, 50

Fentiman *v.* Smith (1803) 117
Finlinson *v.* Porter (1875) 81
Flight *v.* Thomas (1841) 43, 69
Fowlers *v.* Walker (1881) 86, 97
Foxhall *v.* Venables (1590) 8
Frewen *v.* Phillips (1861) 8

Gardner *v.* Hodgson's Kingston Brewery Co. (1901) 34, 38
Gately *v.* Martin (1900) 74
Gateward's Case (1607) 8
Gaved *v.* Martyn (1865) 55, 56
Gayford *v.* Moffatt (1868) 7
Geoghegan *v.* Fegan (1872) 63
Glover *v.* Coleman (1874) 35
Godwin *v.* Schweppes, Ltd. (1902) 77
Goldsmid *v.* Tunbridge Wells Improvement Commissioners (1866) 58, 85
Goodhart *v.* Hyett (1883) 89, 106
Governors of Bridewell Hospital *v.* Ward, &c. (1893) ... 43
Greatrex *v.* Hayward (1853) 56
Grove *v.* Portal 117

PAGE

Haigh *v.* West (1893)... 22
Hall *v.* Lichfield Brewery Co. (1880) 68
Hall *v.* Swift (1838) 35, 101
Hanna *v.* Pollock (1900) 7, 27, 56
Harbidge *v.* Warwick (1849) 46
Harris *v.* De Pinna (1886) 40, 69
Harris *v.* Ryding (1839) 70
Hastings *v.* N. E. Railway Co. (1898) 116
Hawkins *v.* Carbines (1858) 66, 83
Helens (St.) Smelting Co. *v.* Tipping (1866) ... 67, 68
Henning *v.* Burnet (1852) 95
Hewlins *v.* Shipham (1826) 117
Hodgkinson *v.* Ennor (1863) 52
Hole *v.* Barlow (1858) 105
Holker *v.* Porritt (1875) 58
Hollins *v.* Verney (1884) 37
Holmes *v.* Buckley (1691) 101
Holmes *v.* Goring (1824) 95
Humphreys *v.* Brogden (1848)... 70
Hunt *v.* Peake (1860) 70

International Tea Co.'s Stores *v.* Hobbes (1903) 20

James *v.* Plant (1836) 94
James *v.* Stevenson (1893) 96, 102
Jesser *v.* Gifford (1767) 108
Jones *v.* Powel (1629) 104
Jordeson *v.* Sutton, Southcoates and Drypool Gas Co. (1898) 38, 112, 113

Kay *v.* Oxley (1875) 63
Kelk *v.* Pearson (1871) 80
Kensit *v.* Great Eastern Railway Co. (1884) 50
Kidgill *v.* Moor (1850) 108
King, The *v.* The Inhabitants of Horndon-on-the-Hill (1816) 120

Laird *v.* Briggs (1881) 42
Lane *v.* Capsey (1891) 107

PAGE

Lemaitre *v.* Davis (1881) 25, 74
Lemmon *v.* Webb (1894) 107
Liggins *v.* Inge (1831) 98, 102, 118
London & N. W. Rail. *v.* Evans (1893) 70
Lord Battersea *v.* Commissioners of Sewers, London (1896) 43
Lovell *v*, Smith (1857) 26, 101
Lowe *v.* Adams (1901) 120
Lowe *v.* Carpenter (1851) 37

Maberly *v.* Dowson (1827) 2
Manure (National Guaranteed) Co. *v.* Donald (1859) ... 94
Mason *v.* Hill (1833) 58
Mayor, Aldermen, and Burgesses of Bradford *v.* Pickles (1898) 53
McNab *v.* Robertson (1897) 48, 51, 58, 59
Medway Navigation Co. *v.* Earl of Romney (1861) ... 49
Menzies *v.* Bredalbane (1902) 64
Metropolitan Association *v.* Petch (1858) 108
Metropolitan Rail. *v.* Great Western Rail. (1901) ... 61
Mitchell *v.* Cantrill (1887) 8, 39
Mitchell *v.* Darley Main Colliery Co. (1884) ... 71, 72
Molton *v.* Camroux (1849) 109, 110, 111
Moore *v.* Browne (1572) 20
Moore *v.* Rawson (1824) 99, 101
Mounsey *v.* Ismay (1865) 8
Murgatroid *v.* Robinson (1857) 45
Myers *v.* Catterson (1890) 76

National Guaranteed Manure Co. *v.* Donald (1859) ... 94
Neaverson *v.* Peterborough Rural Council (1902) ... 22
Nicholls *v.* Nicholls (1900) 17
Norbury *v.* Mead and Others (1821) 101

Oldfield's Case (1595) 17, 64, 65
Ormerod *v.* Todmorden Joint Stock Mill Co. (1883) ... 54
Outram *v.* Maude (1881) 7

Palmer *v.* Fletcher (1675) 11, 15, 77
Palmer *v.* Paul (1824) 76

PAGE

Payne *v.* Sheddon (1834) 26, 101
Pearson *v.* Spencer (1861) 65
Pendarves *v.* Monro (1892) 97
Penruddock's Case (1598) 104, 107
Perry *v.* Eames (1891) 27
Perry *v.* Fitzhowe (1846) 107
Phillips *v.* Low (1892) 76
Pickard *v.* Sears (1837) 101
Pinnington *v.* Galland (1853) 17, 65
Plummer *v.* Webb (1627) 118
Polden *v.* Bastard (1863) 12
Pollard *v.* Gare (1901) 20, 78
Potts *v.* Smith (1868)... 25
Powell *v.* Butler (1871) 55
Presland *v.* Bingham (1888) 38, 39, 40
Pyer *v.* Carter (1857)... ... ... 4, 14, 19

Queen *v.* Chorley (1848) 66, 90, 101
Quicke *v.* Chapman (1902) 20, 78

Ramsay *v.* Southend Local Board (1894) 60
Rawstron *v.* Taylor (1855) 25, 53, 55
Regina *v.* Chorley (1848) 66, 90, 101
Reignolds *v.* Edwards (1742) 26
Rex *v.* Inhabitants of Horndon-on-the-Hill (1816) ... 120
Richards *v.* Fry (1838) 27, 42
Richards *v.* Rose (1853) 11, 14, 18, 73
Rigby *v.* Bennett (1882) 73
Roberts *v.* Macord (1832) 25
Roberts *v.* Richards (1882) 51
Robins *v.* A brewer 103
Robson *v.* Edwards (1893) 8, 38
Rogers *v.* Taylor (1857) 34, 72
Rowbotham *v.* Wilson (1860) 30, 70
Russell *v.* Watts and Others (1883) 78

Sampson *v.* Hoddinott (1857) 50, 104, 106
Saxby *v.* The Manchester, Sheffield and Lincolnshire Railway Company (1869) 104

PAGE

Scott *v.* Pape (1886) 97
Selby *v.* Nettlefold (1874) 66
Serff *v.* Acton Local Board (1886) 64
Simper *v.* Foley (1862) 46
Simpson *v.* Godmanchester Corporation (1897) ... 6, 28
Simpson *v.* Savage (1856) 108
Skull *v.* Glenister (1863) 62
Smart *v.* Morton (1855) 70
Smith *v.* Baxter (1900) 34, 99
Solomon *v.* Vintners' Company (1859) 25
Soltau *v.* De Held (1851) 105
Some *v.* Barwish (1610) 104
St. Helens Smelting Company *v.* Tipping (1866)... 67, 68
Stockport and Hyde Highway Board *v.* Grant (1882) ... 88
Stockport Water Works Company *v.* Potter (1882) 58, 105
Stokoe *v.* Singers (1857) 100
Sturges *v.* Bridgman (1879) 103
Suffield *v.* Brown (1863) 13, 19
Sury *v.* Pigott (1625)... ... ... 17, 93
Swansborough *v.* Coventry (1832) 16
Swindon Water Works Company *v.* Wilts and Berks Canal Navigation Co. (1875) 5, 49
Symons *v.* Leaker (1885) 42

Tapling *v.* Jones (1865) 38, 75, 86, 87, 97, 112
Taws *v.* Knowles (1891) 17
Taylor *v.* Waters (1817) 120
Thomas *v.* Owen (1887) 13
Thomas *v.* Sorrell (1679) 116
Tickle *v.* Brown (1836) 47
Tipping *v.* St. Helens Smelting Co. (1866) 67
Titchmarsh *v.* Royston Water Works Co. (1899) 17
Tone *v.* Preston (1883) 47
Turner *v.* Spooner (1861) 79, 85

Union Lighterage Co. *v.* London Graving Dock Co. (1902) 13, 14, 36
United Land Company *v.* Great Eastern Railway (1873) 81, 84

PAGE

Wakefield *v.* Duke of Buccleuch (1867) 71
Walter *v.* Selfe (1851) 67, 105
Ward *v.* Ward (1852) 101
Warren *v.* Brown (1902) 80
Watts *v.* Kelson (1870) 11, 15
Webb *v.* Bird (1863) 27, 32, 34, 68, 69
Webb *v.* Paternoster (1620) 118, 120
Westmoreland (Earl of) *v.* New Sharlston Collieries Co. (1899) 70
Whaley *v.* Laing (1857) 52
Whalley *v.* Lancashire and Yorkshire Railway Company (1884) 53, 55
Whalley *v.* Thompson (1799) 63
Wheaton *v.* Maple (1893) 8, 27, 28, 56
Wheeldon *v.* Burrows (1879) 14, 16, 19
White *v.* Bass (1862) 16, 76
Wilson *v.* Taverner (1901) 117
Wilson *v.* Queen's Club (1891) 76
Wimbledon and Putney Commons Conservators *v.* Dixon (1875) 84
Winter *v.* Brockwell (1807) 118
Wood *v.* Lake (1751) 120
Wood *v.* Leadbitter (1845) 116, 117, 119, 120
Wood *v.* Manley (1839) 119, 120
Wood *v.* Saunders (1875) 81
Wood *v.* Waud (1849) 52, 53, 93
Woodyer *v.* Haddon (1814) 61
Wright *v.* Howard (1823) 50, 57, 58, 104
Wright *v.* Williams (1836) 27, 42
Wyatt *v.* Harrison (1832) 70

Yates *v.* Jack (1866) 80
Young *v.* Bankier Distillery Company (1893) ... 52, 53
Young *v.* Star Omnibus Company (1902) 101

Zouch *v.* Parsons (1794) 111

DIGEST

OF

THE LAW OF EASEMENTS.

§ 1. The Law of Easements is a branch of the Law of Servitudes, or rights *in alieno solo*.

A right of servitude is a right by which a person, by virtue of his interest in a certain tenement, is entitled to claim by way of advantage or convenience to his tenement that the possessor of a neighbouring tenement shall submit to something being done by him affecting such neighbouring tenement, or shall forbear from doing something on such neighbouring tenement.

Servitudes may be servitudes with a right to make a profit out of the substance of the neighbouring tenement; as a right to take turf, or dig for minerals.

These are called Profits *à prendre*.

Or they may be servitudes without such a

right, and with simply the right to claim submission or forbearance.

These are called Easements.

The present work does not treat of Profits *à prendre*.

Of Easements Generally.

§ **2.** The tenement in respect of which the advantage or convenience called an Easement is claimed, and the advantage or convenience which is the object of the claim, must both have a permanent existence, or an existence which is intended to continue for a defined term.[1]

Illustration.

A builds a workshop in front of his house. It is built upon posts which are fixed in stone plinths, and these rest on some slight brickwork. The purpose of it was temporary, and it is not fixed to the freehold. The shop has windows which receive light from the tenement of B. Notwithstanding the temporary character of the structure its existence is continued for 20 years. B at length builds so as to obstruct the light coming to A's shop windows. In consequence of the temporary character of the structure, an easement of light cannot be acquired, and an action by A against B fails.

§ **3.** The rights called Easements may come into existence in several ways.

(1.) By express public grant by an Act of the Legislature.[2]

---

[1] *Maberly* v. *Dowson*, 5 L. J. K. B. 261.
Arkwright v. *Gell*, 5 M. & W. 203; L. J. N. S. Exch. 201.

[2] See § 12.

(2.) By express private grant,[1]
inter vivos, or
by testament.
(3A.) By implied grant;[2] or
(3B.) By express or implied reservation.[3]
(4.) By prescription.[4]
Prescription is either by Common Law, or by Statute.

The tenement in respect of which the owner enjoys the easement over the other is called the dominant tenement. That over which the easement is enjoyed is called the servient tenement.

§ **4.** Easements are

Positive or Affirmative.—Such as authorize the commission by the dominant owner of acts which invade the right of the servient owner (*a*).[5]

Negative.—When the owner of the servient tenement is restricted in the exercise of the natural rights of property by the existence of the easement (*b*).

Continuous.—Of which the enjoyment is or

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[1] See § 12.
[2] As on severance of tenements, see § 13.
[3] *Ibid.*
[4] See §§ 15 to 42.
[5] The letters (*a*), (*b*), (*c*), &c. refer to the illustrations following.

may be continual without the interference of man (*c*).

Discontinuous.—The enjoyment of which can only be had by a fresh act on each occasion of the exercise of the right (*d*).

Apparent.—With external signs of existence (*e*), and such as are perceptible, or would be so upon a careful inspection, by a person conversant with such matters.[1]

Non-apparent.—Without such external signs (*f*).

Illustrations.

(*a.*) A has a right of way over B's land.
A has a right to discharge water into B's land.

(*b.*) A having ancient windows giving access of light to his house from B's land, B is restricted in his right to build on his own land so as to obstruct the light passing to A's windows.

(*c.*) A having ancient windows enjoys a right to light from the land of B.
A enjoys a right to the passage of rain-water by a gutter from his house along the house of B.

(*d.*) A has a right of way over B's ground.
A has a right to divert water flowing to B's land.

(*e.*) A has a right to pass through a door on B's premises and by a path beyond it, to get to his own house.
A has a right of access of light to his house through his ancient windows from the lands of B.
A has a right to dam up a watercourse on his own lands below the lands of B.
In these rights there exist the external signs of the door, the path, the windows, and the dam.

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[1] *Pyer* v. *Carter* (1857), 1 H. & N. 916.

(*f*.) A has an ancient building bordering on the boundary between his land and that of B, and has acquired an easement to the lateral support of his land weighted with the building by B's land. Here the right, which is a right of A to continue to rest the weight of his building on the support afforded by B's land, and to restrict B from removing the lateral support afforded by his land, is a non-apparent easement.[1]

Explanation.—A right of prospect cannot be acquired.[2]

The convenience must be of advantage or convenience to the tenement of the person claiming it.[3]

Illustration.

A dams up a stream for the period required to enable him to acquire a prescriptive right; and during that period a portion of the tenement of B higher up is in consequence constantly flooded. But a portion of A's ground is also flooded from the same causes. A has so acted with the object not of benefiting his own tenement, which in fact he has not benefited, but of enabling C, a relation on the opposite side of the stream, to work a mill on property not belonging to A.

A has not acquired an easement to dam up the stream.[4]

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[1] See *Dalton* v. *Angus*, p. 29, *infrà*.

[2] *Bland* v. *Moseley*, cited in *Aldred's Case*, 9 Coke Rep. 58 b.

In the case in Illustration (*b*), *suprà*, B may build so as to obstruct the view from A's house, though he must not build so as to obstruct the light.

[3] See definition of right of servitude in § 1.

[4] Cf. *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. Cas. 697; 45 L. J. Ch. 638.

This case involved a question of a riparian owner's right to divert water for reasonable purposes and to a reasonable extent

§ **5.** Some easements present both positive and negative characteristics.[1]

§ **6.** The terms of the grant, or the circumstances from which it is to be inferred, must express or imply continued use, or use perpetually recurring, though, it may be, at uncertain intervals.

§ **7.** Where the grant is express, the grantor, though not the owner of the tenement over which the easement is granted, but only holding for a term, may grant an easement over his tenement to enure for the remainder of his term.

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from the use of a lower riparian proprietor. It was diverted for the use of a tenement other than that of the person diverting it, and this was the principal ground on which the judgment of the Lord Chancellor (Lord Cairns) proceeded.

But the fact that the exercise of the right, as claimed, for the benefit of the dominant tenement, may also benefit persons other than the owner of the dominant tenement will not prevent the acquisition of the easement.

Simpson v. *Godmanchester Corporation*, (1897) A. C. 696; 66 L. J. Ch. 770.

[1] As in illustration (*f*), p. 5, in which the easement is enjoyed by the thrust upon B's land arising out of the continuing consequences of the original act of A in weighting his land with buildings, and the abstention of B from interfering with his own land in a way to remove the support it has hitherto afforded to A's building.

See *Dalton* v. *Angus*, note, pp. 28 to 33, *infrà*, and the opinions of Lord Selborne (Chancellor), and Lord Watson, and of Lindley and Bowen, JJ., in that case.

Illustration.

(*a.*) A being owner of certain premises lets them to B for twenty-one years *with all lights*. A is at this time under-lessee of adjoining premises for a term of which four years remain unexpired. During the term of A's underlease B has an easement of light to his premises from those occupied by A.[1]

§ **8.** With the exception noted below in § 11 in the case of light, a tenant cannot[2] by *prescription* acquire for himself an easement over a neighbouring tenement, but he may so acquire such a right on behalf of his landlord.[3]

§ **9.** An easement can only be acquired by a *person;* not a congeries of persons.

Several joint owners of property form in respect of that property a person. A corporation is a person.

§ **10.** Variable bodies of individuals[4] are not persons.

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[1] *Booth* v. *Alcock*, L. R. 8 Ch. 663; 42 L. J. Ch. 557.

[2] See *Hanna* v. *Pollock* (1900), 2 Ir. R. 269, C. A., and the opinion of the majority of the judges in that case, that easements in watercourses also may be acquired by such tenement holders by prescription.

[3] *Gayford* v. *Moffat*, L. R. 4 Ch. 133.
Outram v. *Maude*, 17 Ch. D. 391; 50 L. J. Ch. 783; 29 W. R. 818.
Chambres Colliery Co. v. *Hopwood*, 32 Ch. D. 549; 55 L. J. R. Ch. 859.

[4] Such as the inhabitants of a village or parishioners of a

§ 11. For the purpose of acquiring easements of Light, by prescription under the Prescription Act, sect. 3, holders of leaseholds of houses are, as against other leaseholders of houses of the same or different lessors, regarded as holding separate tenements in respect of which they can, as against each other, acquire rights in the nature of easements of light *for the term of their several holdings.*[1]

Illustration.

A and B occupy opposite houses, the property of their lessor C. A can acquire against B, by prescription, a right (to enure during the term of his tenancy) that B shall not obstruct the light passing from B's to his house.[1]

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parish. They cannot prescribe for a right of easement, but can only claim by custom.

Gateward's Case, 6 Coke, €0.

Foxall v. *Venables*, Cro. Eliz. 180.

Mounsey v. *Ismay*, 3 H. & C. 486; 34 L. J. Exch. 52.

Constable v. *Nicholson*, 14 C. B. N. S. 230; 32 L. J. C. P. 240.

[1] *Frewen* v. *Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356.

Mitchell v. *Cantrill*, App. L. R. 37 Ch. D. 56; 57 L. J. Ch. 72.

Robson v. *Edwards*, 3 R. 336; (1893) 2 Ch. 146; 62 L. J. Ch. 378.

But see *Wheaton* v. *Maple*, (1893) in which it was held in appeal that limited and qualified easements are not within the scope of the Prescription Act: 3 Ch. 48; 62 L. J. Ch. 963.

As to the expiry of the right at the determination of the lease, see *Beddington* v. *Atlee*.

In that case B became vendee of one of two plots, of the other of which A was in equity the prior vendee. B's plot

A tenant's possession being that of his landlord, he cannot acquire an easement over his landlord's tenement.

1 & 2.—Of Easements by Express Grant, or Express Reservation.

§ 12. The rights in such easements, whether created by an Act of the Legislature or otherwise, depend on the terms of the grant, and need not be treated of here.

Easements by express private grant or reservation, except by testament, can in England be only created by instruments under seal.[1]

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had a house on it with windows overlooking the grounds sold to A. This had been previously leased for twenty-one years to H, whose lease had not expired at the date of the sale to B. H had enjoyed the light for several years, but B, after the sale to him, recovered judgment against H to enforce a condition of re-entry contained in H's lease, and the lease came to an end. B brought an action for an injunction to restrain A from building so as to obstruct the windows; but it was held, first, that the sale to A being in equity prior to that to B, B had no implied grant of the easement of light; and secondly, that B could not avail himself of the enjoyment of the access of light by H, whose right, if any, as against his landlord in that respect passed away with the determination of the lease.

Beddington v. *Atlee*, 35 Ch. D. 317; 56 L. J. Ch. 655.

[1] As in the case of all incorporeal hereditaments.

3.—Of Easements by Implied Grant, and Implied Reservation.

§ **13.** Easements by implied grant and by implied reservation arise upon severance of a tenement by the owner.

The dependence of one part of a tenement on another part, is not, during unity, said to be an easement.

Illustration.

A has an enclosure in which are two houses; and a way passes from one to the other, which is convenient for the enjoyment of the two portions of his tenement. During A's possession of the entire premises, the one portion is not said to be servient to the other.

By the general right of property it is competent to a man to make one part of his tenement dependent on another, or make the parts mutually interdependent, and grant any such part with the dependence attaching to it to another person.

Such dependence is called a *quasi* easement, and may be either *necessary* or merely *convenient* for the enjoyment of the tenement granted.

Illustrations.

A has a piece of ground, on the lower part of which he erects cattle sheds. From the upper part he conveys water to the

cattle sheds by pipes forming a permanent artificial watercourse.[1]

Here the convenience is called a *quasi* easement.

A builds a pair of houses, each of which by the plan of structure receives support from the other.[2]

This is a *quasi* easement.

A has a piece of ground on a part of which he builds a house with windows through which light has access to the house from the rest of his land.

The access of light through the windows is a *quasi* easement.[3]

A has a piece of land on which he builds a house with a gate and frontage to the road and with a passage passing by the side of the house to the back of the premises and out by another gate.

There is a door at the side of the house into the passage. He builds a cottage on the back premises with a garden between it and the house, the passage forming a convenient means of intercommunication.

The communication by the passage is a *quasi* easement.[4]

A person is equally said to make one part of his property dependent on another or to make the parts mutually interdependent whether the state of things brought about be the result of his own act or mode of use of the property, or whether having become the owner of this property he continues the use of it in the dependent or interdependent condition of the parts impressed upon the property previously.

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[1] *Watts* v. *Kelson*, L. R. 6 Ch. 166; 40 L. J. Ch. 126.

[2] *Richards* v. *Rose*, 9 Exch. 218.

[3] *Palmer* v. *Fletcher*, 1 Levinz, 122.

[4] *Dodd* v. *Burchell*, 31 L. J. Exch. 364; 1 H. & C. 113.

§ **14.** On severance of a tenement by transfer or devise of a portion of it or otherwise,

(A.) A grant to the grantee will be implied (1) of all those conveniences called *quasi* easements which are required to enable the grantee to enjoy the portion granted according to the expressed purpose of the grant; and (2) of all *quasi* easements of a continuous[1] and apparent character which the part of the tenement granted derives from the part reserved and which have in fact been used by the owner during the unity, and which, by the disposition of the two portions *inter se*, are required for the convenient use of the part conveyed, though they may have had no legal existence as easements.

A discharge to the grantee will also be implied of all those conveniences called *quasi* easements which are mere conveniences, not of a necessary character, hitherto used and enjoyed by the grantor in respect of the portion reserved over the portion granted.[2]

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[1] *Polden* v. *Bastard* (case of a pump), apparent but not continuous, so that the grant was *not* implied:
L. R. 1 Q. B. 156; 35 L. J. Q. B. 92.

[2] "When the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end by contract to the relation which he had himself created between the tenement

(B.) A grant to the grantee and reservation to the grantor respectively will be implied of all those conveniences called *quasi* easements, which either portion of the tenement during unity enjoyed from or over the other, and

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sold and the adjoining tenement, and discharges the tenement so sold from any burthen imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such ownership:" *per* Ld. Westbury, C. in *Suffield* v. *Brown*, 33 L. J. Ch. 249; 12 W. R. 356.

See *Union Lighterage Co.* v. *London Graving Dock Co.*, App. (1902) 2 Ch. 557; 71 L. J. Ch. 791.

But when there is a right to such a convenience outstanding in a third party, a discharge will not be implied, but the *quasi* easement will be reserved.

A and B were tenants of adjoining farms under the same landlord. They were at first tenants from year to year. In 1873 B took a lease of his farm, and in 1878 A took a lease of his, with all the appurtenances thereunto belonging. A public road passed through B's farm to the sea coast, and a private lane used by A's carts going to and from the coast passed from A's farm through a portion of B's farm connecting A's farm with the public road. This had always been enjoyed by A. The lane was banked on either side and was shut off from B's farm. Held on action brought by A for obstruction by B, that this lane was required for the convenient and comfortable enjoyment of A's farm, and that the demise to B in 1873 could not be made free of the right of A to use the lane without derogating from the grant of the tenancy to A, in whose favour a reservation of the lane must be implied in the right which passed to A under the word "appurtenances" in the lease of 1878.

Thomas v. *Owen*, 20 Q. B. D. 225; 57 L. J. R. Q. B. 198.

without which the enjoyment of the severed portions could not be had at all, or could not be had except through an extravagant and unreasonable outlay.

Quasi easements of this class are called after severment easements of necessity.[1]

(C.) Where the intention of the vendor, though not expressed by the terms of a grant in writing, has been expressed previously to the alienation by a disposition of the property which is inconsistent with his having granted (as appurtenant to the tenement sold) a convenience theretofore used over the tenement which he retains, such convenience, unless it be one of necessity, is not conveyed to the vendee.

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[1] These easements seem to include easements of reciprocal dependence of one portion of the joint tenement on the other, as in the case of two houses built contiguously, and so as to render the one dependent on the other for support.

See the remarks of Lord Justice Thesiger in *Wheeldon* v. *Burrows*, 12 Ch. D. 31, on the justification of the decisions of *Richards* v. *Rose*, 9 Exch. 218, and *Pyer* v. *Carter*, 1 H. & N. 916, on grounds other than those on which they were decided.

See the opinion of Stirling, L. J., in *Union Lighterage Co.* v. *London Graving Dock Co.*, (1902) 2 Ch. 557; 71 L. J. Ch. 791, to the effect that the easements referred to in *Wheeldon* v. *Burrows*, as easements that will be held to be reserved without express mention, are easements of necessity only.

Illustrations to § 14—(A.).

A has a plot of land, a portion of which he grants to B for the purpose of building a house thereon. B is entitled to such lateral support from the reserved portion as may be required to ensure the safety of the building contemplated.

A is the owner of two adjoining houses. A gutter runs along the top of both houses which carries off rain-water.

The flow is from house '*a*' to house '*b*.'

A sells house '*a*' to B, and then house '*b*' to C. C cannot restrain B from letting the water pass by the portion of the gutter appurtenant to C's house, because C takes only the rights of A, and the passage of the water by the gutter, though not an easement, is a continuous and apparent convenience, used by the owner during the unity of possession, and required by the disposition of the two tenements *inter se* for the convenient use of the tenement conveyed to B.[1]

For the purpose of watering cattle on estate '*a*' on which cattle sheds have been erected, a system of pipes conveys water from the adjoining estate '*b*' to estate '*a*.' Both belong to one person, A. He sells '*a*' to B, and afterwards sells '*b*' to C. A grant is implied in favour of B of this continuous and apparent convenience. C, who represents the rights of A in estate '*b*,' cannot cut off the water from B.[2]

A has a piece of ground on a part of which he erects a house, which receives light through its windows from the other portion of his ground. He afterwards sells the house to B. B has a right to the continuous and apparent convenience of light to his house as used and enjoyed by A previous to the severance of tenements, and A cannot build so as to obstruct the light to the windows of the house.[3]

A had a piece of land on a part of which was a house with windows receiving light from the other portion. He sold the house and adjoining land at the same time to B and C respectively. C built so as to obstruct the lights of the house pur-

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[1] *Coppey* v. *J. de B.*, 11th Hen. VII.

[2] *Watts* v. *Kelson*, L. R. 6 Ch. 166; 40 L. J. Ch. 126.

[3] *Palmer* v. *Fletcher*, 1 Levinz, 122.

chased by B. C takes only the rights of A, who, having sold to B, has granted him the continuous and apparent convenience of light to the house from the reserved tenement.[1]

A has a piece of ground on a part of which he builds a house. He then sells the house to B, reserving to himself the remaining land from within a few feet of the house. A grant is implied in B's favour of the lateral support of the adjoining land, which A reserves, to the land weighted with buildings which is now B's.

A had a piece of land on part of which was a house. From the adjoining vacant portion there was access of light to the house. He first sold the portion adjoining the house to B, and then the portion with the house to C. B built so as to obstruct the light hitherto received from his portion of the property by the windows of C's house. On an action by C, it was held that B was entitled to do so. A in selling to him discharged the portion so sold of all burthens in the way of conveniences theretofore used and enjoyed by one portion of the tenement over the other, and B was free to build on the portion sold to him.[2]

A had two neighbouring houses, '*a*' and '*b*.' He occupied '*a*' and let '*b*,' retaining a right of way, *not a way of necessity*, running along a walled passage across the premises of the house '*b*.' A afterwards mortgaged '*b*' with its premises, including the passage, but without reserving any right of way. A died pending the mortgage, leaving '*a*' to B and '*b*' to C. C redeemed the mortgage and blocked up the passage. B had sold '*a*' to D. D therefore now stood in the place of A as regards house '*a*,' and sued C for blocking up the passage. But by the terms of the mortgage the passage had not been expressly reserved, and reservations of mere conveniences in the nature of easements, though used and enjoyed during unity, cannot be

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[1] *Swansborough* v. *Coventry*, 9 Bing. 305.
Allen v. *Taylor*, 16 Ch. D. 355.

[2] *White* v. *Bass*, 7 H. & N. 722.
Wheeldon v. *Burrows*, 12 Ch. D. 31.

implied in favour of a grantor. C was held to be entitled to prevent D from using the passage.[1]

Illustrations of Easements of Necessity—(B.).

(*a.*) "A had an acre of land which was in the middle of and encompassed with other of his lands, and enfeoffs B of that acre. B has a convenient way over the lands of the feoffor."[2]

(*b.*) A possesses two tenements. From the tenement '*a*' a stream of water runs to tenement '*b*,' and fills a pool appurtenant to '*b*.' The pool is essentially necessary to the enjoyment of the tenement '*b*,' and the convenience was used by A and those from whom he derived his title as appurtenant to the tenement '*b*,' and necessary to its enjoyment. A sells '*b*' to C. A cannot stop the flow of water to C's pool.[3]

(*c.*) A has two closes, '*a*' and '*b*.'

'*a*' is only accessible by a path through '*b*.' A sells '*a*' to C, and afterwards sells '*b*' to D.

C has a way of necessity through '*b*' by implied grant. But supposing that A sells '*b*' first to D, and retains '*a*' himself for some time, and afterwards sells '*a*' to C, A would by implied reservation have a way of necessity through the close sold to D; and on his conveying to C the latter also would have this privilege.[4]

A owned the whole of certain premises consisting of a house with garden at back, and with a cottage and grounds at the back of the garden. A sold the cottage and grounds to B, and then

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[1] *Taws* v. *Knowles*, 2 Q. B. 564; 60 L. J. Q. B. 641.

[2] *Oldfield's Case*, Noy's Reports, 123.
Nicholls v. *Nicholls*, 81 L. T. 811.
See *Titchmarsh* v. *Royston Water Co.*, 81 L. T. 673; 48 W. R. 201. Premises not surrounded by the land of vendor on all sides, but abutting on one side on a public road in a deep cutting: Held, no way of necessity, as the plaintiff could cut himself a way into the public road.

[3] *Sury* v. *Pigott*, Popham's Rep. 166; Tud. L. C.

[4] *Pinnington* v. *Galland*, 9 Exch. 1; 22 L. J. Exch. 341.

sold the house and garden to C. There was a passage by the side of the house, with a door in the house opening into the passage and into a garden beyond, and also with a door opening into a part of the passage which had been conveyed to B. This passage had been enjoyed during unity. B, the first vendee, blocked up the door leading to his part of the passage. C had a way to his garden other than through the passage, and had a way to his house by the front door, and so had no necessity to get access to his house or garden through B's premises. There was no "way of necessity" by the blocked passage, and A in conveying to B necessarily discharged the premises so conveyed from the previous burdens not amounting to easements of necessity. Held, that no right of way from the garden door through any part of B's premises could be implied.[1]

A erected two contiguous houses so built that they depended on each other for support. A sold one to B and the other to C. It did not appear which was first granted. B brought an action against C for removing the support afforded by the house sold to him. It was held that C could not lawfully do this, as the houses necessarily required mutual support, and it must be implied that A, in selling the house first sold, whichever it was, not only granted it with the support of the one reserved, but also reserved to himself the right of support to the reserved house from that which he sold; and in afterwards selling the house reserved, passed it on with the reserved right of support attaching to it; so that it was immaterial which of the two was sold first.[2]

A is the owner of two contiguous houses, house '*a*' and house '*b*,' under which a drain runs from '*a*' to '*b*,' and so under '*b*' to the sewer. Rain-water which falls upon house '*b*' is carried off by a pipe to house '*a*,' and so down to the drain, so that the water which first passes from '*b*' to '*a*' is afterwards returned by the drain from '*a*' to '*b*,' and is so got rid of to the convenience of both houses. A sells '*b*' to C without express reservation of the right to discharge the contents of the

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[1] *Dodd* v. *Burchell*, 1 H. & C. 113.

[2] *Richards* v. *Rose*, 9 Exch. 218.

drain through such part of the drain as runs under the tenement sold to C, and afterwards sells '*a*' to D. D has a right to discharge the contents of the drain under his house through that portion of the drain which is under C's house, because this convenience was used by the owner during unity of possession, and is a part of that reciprocal dependence of the two houses, the one on the other, which existed at the time of the sale of '*b*' to C.[1]

Illustration—(C.).

A buys a tenement from part of which ('*a*') water flows through a pipe to another part ('*b*'). A cuts the pipe and stops the flow of water which was not necessary to the enjoyment of the portion '*b*.' He then sells '*b*' to C. The convenience of

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[1] See *Pyer* v. *Carter*, 1 H. & N. 916; 26 L. J. Exch. 258.

In the case of *Suffield* v. *Brown*, Lord Westbury dissented from the decision in *Pyer* v. *Carter*, saying that in all such cases the vendee took according to the terms of his conveyance, and not according to the disposition of tenements, and that it was unadvisable to introduce the fiction of an implied reservation by the grantor of a right which he did not expressly reserve in his conveyance. Notwithstanding this expression of opinion by so eminent an authority, considerable doubt prevailed for some years as to its soundness, and it was not until the case of *Wheeldon* v. *Burrows*, 12 Ch. D. 31, that it was finally and fully accepted. The result is that since the decision in that case (1879), the doctrine of the implied reservation by the grantor of a right of easement, not being an easement of necessity, and not expressly reserved to him by the conveyance, can no longer be maintained on the ground of the disposition of tenements. But as pointed out by Lord Justice Thesiger, the decision in *Pyer* v. *Carter* may be supported on the facts of the case, which showed that there was reciprocal interdependence between the two tenements rendering the easement necessary to the use of the tenement with which the grantor last parted. The case is therefore now given as an illustration of an easement of necessity of the "reciprocal interdependence" class.

the flow of water is not conveyed to C by the mere sale to him of the tenement '*b*.'[1]

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[1] (Dame Browne's Case) *Moore* v. *Browne*, Dyer, 319 b.

NOTE to §§ 13 and 14 on "Easements by implied grant," &c. Except in the case of continuous and apparent easements and easements of necessity, conveniences enjoyed during unity of possession would not generally pass on severance of a tenement and conveyance of one portion of it without express words, such as "therewith used and enjoyed," &c.

But now, under sect. 6 of the Conveyancing Act of 1881, such words are not necessary. All such conveniences will pass to the extent to which they were enjoyed while unity lasted, if and so far as a contrary intention is not expressed in the conveyance. And in *Bromfield* v. *Williams*, (1897) 1 Ch. 602; 66 L. J. Ch. 305, it was held that in the conveyance of a house, which under sect. 6, sub-sect. 2, would be held to convey an easement of light over the adjoining land of the grantor, the description of such adjoining land as building land does not show a contrary intention so as to exclude under sub-sect. 4 the right to light under sub-sect. 2. The Act, however, will only apply to conveyances executed subsequent to its coming into force, 1st January, 1882.

See *Pollard* v. *Gare*, (1901) 1 Ch. 834; 70 L. J. Ch. 404.

Quicke v. *Chapman*, (1903) 1 Ch. 659; 72 L. J. Ch. 373; 51 W. R. 452, C. A.

In *Quicke* v. *Chapman* the builder who transferred the lease had, at the date of the transfer of it, no such interest in the land adjoining and over which the assignee of the lease claimed an easement of light as would have enabled him to make a grant of the easement claimed, so that such a grant could not be implied.

See illustration, p. 78, *infrà*.

International Tea Stores, Ltd. v. *Hobbs*, (1903) 2 Ch. 165; 72 L. J. Ch. 543.

4.—Easements by Prescription.

PRESCRIPTION AT COMMON LAW.

§ **15.** Property in an easement may be acquired by prescription at common law by showing that the use of it has been immemorially enjoyed by the claimant and those through whom he claims.

§ **16.** Proof of usage for a period of reasonable length,[1] is considered sufficient evidence of immemorial usage.

§ **17.** The period is not sufficient unless it is of such a length as to raise the presumption of a grant having been made originally and since lost.

A grant may be presumed to have been made at a remoter period and lost, if uninterrupted enjoyment for 20 years is shown.[2]

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[1] This was at one time thought to require a period of no less duration than from the 1st year of Richard the First.

[2] This presumption is one of fact. The fiction of the presumption of a lost grant was invented about 1760 (see the judgment of Lord Blackburn in *Dalton* v. *Angus*, at p. 812, 6 App. Ca., H. L.), to avoid the difficulty of proof of immemorial usage. It means little more than that, after proof has been given of uninterrupted enjoyment for 20 years, there is generally strong ground for believing that the enjoyment had a lawful origin, and that the jury may be called upon to

§ **18.** No claim to the acquisition of an easement by prescription at common law can be established :—

If the claim be in conflict with a statute.

If it be at variance with a prescriptive right.

If the claim be in conflict with the express or implied limitations of a grant or agreement between the dominant and servient owners.

If the servient owner is ignorant of the user.

If the servient owner, either from the nature of the user by the dominant tenement, or from the nature of the occupancy of the

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find, not that it had such an origin, but whether it had such an origin or not. In terms they are called upon to find whether there was or not a grant, which has since been lost; being told at the same time that if they believe that quiet enjoyment has been had, as testified, for 20 years uninterruptedly, they ought so to find.

And see *Haigh* v. *West*, 4 R. 396; (1893) 2 Q. B. 19; 62 L. J. Q. B. 532.

Such a grant, however, will not be presumed if the right claimed is contrary to the provisions of an award made under an Inclosure Act passed not solely in the interests of private persons, but in the public interest also, as with the purpose of draining a fen area. *Haigh* v. *West* distinguished.

Neaverson v. *Peterborough Rural Council*, (1902) 1 Ch. 557; 71 L. J. Ch. 378.

servient tenement, is incapable of resisting the user by reasonable means.*

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* In *Dalton* v. *Angus*, a case of the right to the support of ancient buildings by adjoining land (6 App. Ca. (H. L.) p. 740), several of the judges were of opinion that the servient owner was incapable of resisting the user by reasonable means. A man who builds on the border of his land does nothing unlawful. The neighbour is bound to keep up a sufficient support to the land itself, *i.e.*, to continue to forbear from diminishing the amount of support needed for the land unweighted with buildings. If he proposes to withdraw the support required for the extra thrust with which he is burdened by the buildings, how is he so to limit his excavation as to stop short of the point at which the land itself would give way even though unweighted with buildings (see § 83)? Unless he confines himself within such an amount of excavation he becomes liable for damage to the land. But it is practically impossible to ascertain the minimum of support required for the land unweighted with buildings, and it therefore would seem to be practically impossible to resist the user. And in any case the circumstances in which a man is driven to lay waste his own land in order to relieve it of the pressure of his neighbour's house, can hardly be said to afford reasonable means of resisting the user.

It seems, too, a strange anomaly that, while it is quite lawful for a man to build on the border of his land, it should also be lawful for the neighbour to destroy the building, by excavation in his own soil, within twenty years of its erection.

But the Court held that on the long current of authorities the easement might be acquired by prescription at common law; and some of the judges, including the Lord Chancellor, contrary to the opinions of those just referred to, considered that the user was capable of being resisted by reasonable means.

Illustrations.

(*a.*) The servient tenement is leased for 19 years to a tenant by A, the owner, and after the termination of the lease he leases again for 3 years. During the first 20 years of that period the owner of the dominant tenement enjoys a user of the light passing unobstructed from the servient tenement. He is then obstructed by the tenant of the servient tenement. But during the first 19 years the landlord had no power to oppose the user. The prescriptive right is not acquired at common law.

(*b.*) A, the servient owner, though only occupying by a tenant, has, during a part of the term of the lease, notice of the user by the dominant owner.

At the termination of the lease he renews, granting a 20 years' lease, without requiring his tenant to resist the user. During the whole of the renewed term of 20 years the dominant tenement enjoys the user.

The owner of the dominant tenement may claim a prescriptive right.

(*c.*) A is the owner of soil subjacent to land of B, which A's soil supports.

A excavates the subjacent soil for 20 years without leaving any support, and claims to have acquired a prescriptive right so to excavate; but he cannot acquire the right, inasmuch as A has not done any act in the soil of B, and B had no means of preventing A from excavating in any manner he pleased.[1]

(*d.*) A is the owner of a mine, from which he has pumped the water during 20 years for facilitating the excavation of its minerals. The water which, as it issued from the mine, formed a stream, was used for 20 years by B for his mill. A, not finding it necessary any longer to pump out the water, ceases to do so, and the stream is no longer supplied. B claims to have the stream continued.

During the 20 years of B's user, A could only have resisted the user by getting rid of the water in a different way, which would have entailed considerable expense. As A has not had

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[1] *Blackett* v. *Bradley*, 1 B. & S. 940; 31 L. J. Q. B. 65.

reasonable means during the 20 years of resisting the user, B cannot claim a right by prescription to the continuance of the supply.[1]

(*e.*) A claims a right of support by prescription at common law to his building from the contiguous building of B, and founds a claim to damages on this right by reason of B having removed his building, and thus endamaged A's building. Such a right cannot be allowed, because it cannot have existed immemorially, and because it cannot have been openly acquired, and there was therefore no opportunity for resistance.[2]

§ 19. No easement of light can be claimed except as appurtenant to buildings.

Illustration.

A has a timber yard and saw-pit, and has been in the enjoyment of the light passing laterally over B's ground to his saw-pit for more than 20 years. B then builds and obstructs the light. A cannot claim a right of easement to have the obstruction removed.[3]

§ 20. An easement cannot be acquired by prescription at common law to water not flowing in a defined course, and to collections of water that are not permanent.[4]

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[1] *Arkwright* v. *Gell*, 5 M. & W. 203; 8 L. J. N. S. Exch. 201. See also § 2, *ante*, as to permanence of the object of the claim.

[2] *Solomon* v. *Vintners' Co.*, 4 H. & N. 585; 28 L. J. Exch. 370. This case, however, is no longer law if *Lemaitre* v. *Davis*, 19 Ch. D. 281, in which it was decided that such an easement may be acquired under the Prescription Act, is accepted, since the Prescription Act admits of the acquisition of those easements only which might have been acquired at common law.

[3] *Roberts* v. *Macord*, 1 Moo. & Rob. 230.
Potts v. *Smith*, L. R. 6 Eq. 311; 38 L. J. Ch. 58.

[4] *Rawstron* v. *Taylor*, 11 Exch. 369; 25 L. J. Exch. 33.

§ **21.** The character of the enjoyment to enure as a prescriptive right must be throughout that of an easement.[1]

§ **22.** The suspension of user temporarily by agreement, or the substitution temporarily of another user for the particular one exercised, is not an interruption.[2]

Illustrations.

A is using a way over B's close. B wishes to make a canal across the way and builds a bridge over it, by which A may then cross.

The use of the way is suspended by agreement for this purpose. This is not an interruption.

A uses a way over B's close. B wishes for a few days to place a tent over a portion of the way, and allots to A another way by which he may pass round the tent into the other portion of the way.

A makes use of this new path. This is not an interruption.

PRESCRIPTION UNDER THE PRESCRIPTION ACT.[3]

§ **23.** No easement can be acquired under this Act unless the servient or dominant owner

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[1] Therefore, if during a part of the enjoyment on which the claim depends there has been unity of ownership of the two tenements vested in the person claiming as dominant owner or in his assignors, the continuity of enjoyment required in the character of an easement is destroyed.

[2] *Payne* v. *Sheddon*, 1 Moo. & Rob. 382.
Lovell v. *Smith*, 3 C. B. N. S. 120.
Reignolds v. *Edwards*, Willes, 282.

[3] & 3 Will. IV. c. 71, 1832. It has been held that the

brings an action;[1] in which case, to enable the owner or occupier of the dominant tenement to claim the right to the easement, the enjoyment must be shown to have continued up to the commencement of the suit or action.[2]

§ **24.** The easements which can be acquired by statutory Prescription under the Prescription Act are such[3] easements at common law as may be acquired by grant, prescription, or custom, *to any way or other easement*,[4] or to any watercourse and use of water.

3rd section of the Prescription Act (access and use of light to tenements) has no application as against the Crown, which is not mentioned in it.

Perry v. *Eames*, (1891) 1 Ch. 658; 60 L. J. Ch. 345.

Wheaton v. *Maple*, (1893) 3 Ch. 48; 62 L. J. Ch. 963, C. A. It was also held in the same case that limited and qualified easements are not within the scope of the Act.

[1] *Wright* v. *Williams*, 1 M. & W. 77; 5 L. J. N. S. Exch. 107. *Richards* v. *Fry*, 7 A. & E. 698; 7 L. J. N. S. K. B. 68.

[2] See sect. 4, Prescription Act.

[3] Easements in collections of water that are not permanent cannot be acquired at common law (see § 20, *ante*), and therefore cannot be acquired under the Prescription Act.

Hanna v. *Pollock*, 2 Ir. R. 664, C. A. 1900.

[4] See sect. 2, Prescription Act, and see in *Dalton* v. *Angus*, the observations of Selborne, Lord Chancellor, summarized at p. 32, on the construction of this section, and especially of the words in *italics*, with reference to the opinion of Erle, C. J., in *Webb* v. *Bird*, that the application of the section is confined to easements of ways and water. 6 App. Ca. 740.

§ 25. The enjoyment on which the easement is claimed must have been without interruption.[1]

Illustration.

Enjoyment of wind to a mill is not susceptible of interruption. Such a right, therefore, cannot be acquired as an easement under the Prescription Act.[2] (See sect. 2.)

And see the opinion of Lord Davey in *Simpson* v. *Godmanchester Corporation*, (1897) A. C. at p. 709.

But the words "or other easement" in this section do not include "light." *Wheaton* v. *Maple*, *suprà*.

[1] See as to the meaning of "without interruption," §§ 28 and 35.

[2] The right to support of buildings by land does not come under the category of easements which can be acquired under the Prescription Act, unless it be of a kind that is susceptible of interruption. In *Dalton* v. *Angus*, *suprà*, the Lord Chancellor (Selborne), Lord Blackburn, and Lord Watson considered that such an easement was susceptible of interruption and could be so acquired. Fry, J., in a very elaborate judgment, expressed a contrary opinion, and Lord Penzance agreed with him. The question whether such an easement can be acquired under the Prescription Act was not finally determined in this case. On the authorities the easement was capable of being acquired, and was held to have been acquired by prescription at common law.

I append a tabular statement (pp. 30 to 33), from which may be seen the opinions of the judges in the final stage of this important case on the particular questions formulated for their consideration.

Some of the judges, it will be seen (notably Pollock, Field, and Manisty), were of opinion that the right of support in such cases might be acquired by prescription at common law, but does not rest on grant, but is a right of property restricting the

neighbour from removing the support after the buildings have become ancient. The Lord Chancellor (Lord Selborne) thought that the easement might be acquired, both by prescription at common law, and under the Prescription Act, and Lord Coleridge agreed with him. Lord Blackburn agreed with Lord Selborne and Lord Coleridge that it might be acquired at common law, but wished to give no opinion as to the applicability of the Prescription Act.

All the judges agreed that open enjoyment was all that was necessary for the acquisition of the easement, even when alterations were made which threw an extra burden on the servient tenement.

Bowen, J., qualified his opinion to the same effect by saying that to render knowledge or notice unnecessary the open enjoyment must be such as would give knowledge or notice of the altered character of the buildings.

Fry, J., and Lord Penzance agreed that no interruption was possible in such a case, and consequently that the right did not rest upon prescription, either at common law or under the Act, but that the right existed after 20 years' open enjoyment, though it did not rest on any principle; and Lord Selborne, with whom Lord Watson agreed on this point, expressed the opinion that the easement had positive as well as negative characteristics (see note, p. 6), which, apart from authority, would go far to establish as a necessary consequence that the right of support might be gained by prescription.

	Has the owner of ancient buildings a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land?	*Is the period during which plaintiff's house has stood sufficient to give him the same right as if the house were ancient?*
Pollock	Yes. It is a rule of law resting not on grant but on a right of property which restricts the neighbour from so using his property as to injure the plaintiff's house. A man reasonably using land has a right to support, which after twenty years is indefeasible.	Yes, the facts show that the house had stood in the same state since 1849.
Field	Yes. Open continuous enjoyment without interruption converts enjoyment into right to support after the period of time requisite to make the building ancient. Case of subjacent stratum put (*Rowbotham* v. *Wilson*), showing that the right is acquired though no interruption may be possible.	Yes.
Lindley	Yes. The current of authorities is unbroken.	Agreed with all the judges who hold that opinion that the Prescription Act does not apply. In the absence of open uninterrupted enjoyment the right cannot be acquired.
Lopes	The same as Lindley.	Same as Lindley.
Manisty	The same as Pollock and Field. Not a natural right but a right of property.	The same as Pollock and Field.
Fry	The right exists on a long series of authorities, but does not rest on any principle. The only principle on which it could rest is that it is an incident attached to property, or that it was acquiesced in. This implies a power of interruption which in such cases does not exist.	Twenty years a reasonable period for acquiring the right.

If acts of defendant would have caused no damage before 1849, *must the defendant have had knowledge or notice of the alterations in order to make the damage done after twenty-seven years an actionable wrong ?*	*If so, is it sufficient to prove knowledge or notice of the fact, or must knowledge of the effect of alterations be proved ?*	*Was the course taken by the judge correct in directing verdict for plaintiff ? or ought he to have left any question to the jury ?*
Notice not necessary. Alterations made openly. The case is the same as if the house was built as a coach factory in 1849.	No answer necessary.	Yes. No question was raised by the defendant as to the facts given in evidence for plaintiff.
No. Actual enjoyment sufficient.	No answer necessary.	Yes, for the same reasons.
Plaintiff must prove an open enjoyment.	If open enjoyment proved, not necessary to prove notice.	Plaintiff's building peculiarly constructed, therefore the question of fact should have been left to the jury whether enjoyment of the right claimed was open.
Same as Lindley.	Same as Lindley.	Same as Lindley.
The same as Pollock and Field.	The same as Pollock and Field.	Same as Pollock and Field.
Not necessary to prove knowledge or notice.	No answer necessary.	The judge's course correct. His conclusion involves the proposition that by the mere act of his neighbour and the lapse of time, a man may be deprived of the lawful use of his own land.

—	*Has the owner of ancient buildings a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land ?*	*Is the period during which plaintiff's house has stood sufficient to give him the same right as if the house were ancient ?*
Bowen.....	An ancient house has such a right. It is an acquired right. It involves a burden on the land of the neighbour. It is *capable*, though it may be *difficult* of interruption.	The period sufficient if enjoyment open and if defendant did not show that the right had no lawful origin.
Coleridge	Agreed with the Lord Chancellor and Lord Blackburn.	Agreed with the Lord Chancellor and Lord Blackburn.
Selborne, Chancellor ..	The right is an easement not merely negative. Such a right may be gained by prescription. It is capable of interruption. The second section of the Prescription Act not restricted to way and watercourse. In *Webb* v. *Bird*, the opinion of Erle, C. J., to this effect wrong. If the Prescription Act does not apply, then twenty years' user raises presumption of grant.	Yes.
Lord Penzance	Agreed with Mr. Justice Fry.	Agreed with Mr. Justice Fry.
Lord Blackburn	Yes. The right, he thinks, is acquired at common law; wished to give no opinion as to the Prescription Act.	Yes.
Lord Watson.....	Such a right is long established, *Bonomi* v. *Backhouse*. The easement is a positive one.	

If acts of defendant would have caused no damage before 1849, *must the defendant have had knowledge or notice of the alterations in order to make the damage done after twenty-seven years an actionable wrong?*	*If so, is it sufficient to prove knowledge or notice of the fact, or must knowledge of the effect of alterations be proved?*	*Was the course taken by the judge correct in directing verdict for plaintiff? or ought he to have left any question to the jury?*
Express knowledge or notice of alterations must be proved, or such open enjoyment shown as would give knowledge or notice, or as would give notice of the altered character of the buildings.	If enjoyment open, not necessary to prove knowledge of effect of alterations.	The judge should have left it to the jury to find whether the enjoyment was open.
Agreed with the Lord Chancellor and Lord Blackburn.	Agreed with Lord Chancellor and Lord Blackburn.	Agreed with the Lord Chancellor and Lord Blackburn.
No.	Knowledge sufficient.	No question for the jury.
Agreed with Mr. Justice Fry.	Agreed with Mr. Justice Fry.	Agreed with Mr. Justice Lindley.
No.	Knowledge sufficient that some support is being enjoyed.	No question for the jury.

§ **26.** The claim to an easement under the Prescription Act may be made in the name of the occupier or owner of the dominant tenement, but when the easement is acquired, it is acquired for the benefit of the dominant tenement, under a presumed grant to the owner of the fee.

§ **27.** A claim cannot be made under the Act unless the enjoyment has been actually had for at least 20 years.

§ **28.** A claim to an easement under an enjoyment extending to any period short of 40 years can only be made if the enjoyment has been had *as of right*[1] *and without interruption.*[2]

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[1] This is the meaning of the words "actually enjoyed by any person claiming right thereto." (See § 42.)

Gardner v. *Hodgson's Kingston Brewery Co.*, (1901) 2 Ch. 198; 70 L. J. Ch. 504; H. L., 11 May, 1903, affirmed.

[2] The words "without interruption" suppose a power of interruption, which means a power to do, with a view to put a stop to the claim, some act which would not entail an unreasonable waste of labour and expense.

Per Wills, J., see *Webb* v. *Bird*, cited with approval by Lord Penzance in *Dalton* v. *Angus*, 6 App. Ca. 806.

"Interruption" does not mean mere contention or protest without some act tending to deprive of his enjoyment the party claiming the right. It refers to an adverse obstruction, not to a mere discontinuance of the user.

Rogers v. *Taylor*, 2 H. & N. 828.

Smith v. *Baxter*, (1900) 2 Ch. 138; 69 L. J. Ch. 437.

Nothing is to be deemed to be an interruption unless the act of interruption has been submitted to or acquiesced in for one year.[1]

In order to negative submission, it is not necessary that the party interrupted should have brought an action or suit, or taken any active steps to remove the obstruction: it is enough if he has communicated to the party causing the obstruction that he does not submit to or acquiesce in it.[2]

§ **29.** The right to the easement under such enjoyment cannot be defeated by merely showing that the right so enjoyed for 20 years was first enjoyed at a date prior to the period of 20 years, such date being more recent than the first year of the reign of Richard I.[3]

Illustration.

Richard I. ——— *b* ——— *x* ——— *a* ——— *a*

a a = enjoyment for the full period of 20 years as of right and without interruption.

The claim in respect of "*a a*" cannot be defeated by showing

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Accidental interruptions to users are not such interruptions as are contemplated by the Act.

Hall v. *Swift*, 4 Bing. N. C. 381; 7 L. J. N. S. C. P. 209.

[1] Sect. 4 of the Act.

[2] *Glover* v. *Coleman*, L. R. 10 C. P. 108; 44 L. J. C. P. 66.

[3] *I.e.*, the period in history to which legal memory is supposed to extend.

that the enjoyment had its origin at any period (say *x* or *b*) more recent than the first year of the reign of Richard the First.

§ **30.** But the right to an easement (other than an easement of light) under the enjoyment of 20 years required by the Act, may be defeated in any other way in which an easement claimed by prescription at common law might be defeated before the Act.[1]

§ **31.** The claim (except to an easement of light) may be defeated,[2] by showing that the enjoyment was not submitted to, or that the easement was enjoyed secretly and without the knowledge of the owner of the servient tenement,[3] or that the enjoyment during the 20 years was subject to interruption, and was on every occasion resumed by licence of the owner of the servient tenement, or that in some part of the 20 years enjoyment was had only by such licence given before or during the 20 years.

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[1] Sect. 2 of the Act.

[2] As it might be at common law before the Act.

[3] As to ignorance of user, and circumstances which should have put the servient owner on inquiry, and so have precluded the plea of ignorance, see the opinion of Vaughan Williams, L. J., in *Union Lighterage Co.* v. *London Graving Dock Co.*, (1902) 2 Ch. 557; 71 L. J. Ch. 791.

§ **32.** The claim (except to an easement of light) may also be defeated if the easement is shown to have been enjoyed discontinuously.[1]

Illustration.

A, for the purpose of cutting timber in his wood, had used a road belonging to B 31 years before the action by B for trespass, and again 16 years before the action, and again in the year in which the action was brought. The right not having been exercised continuously, A's defence of actual enjoyment for 20 years as of right fails.[2]

The expression "actually enjoyed" does not require *absolute* continuity of enjoyment.

Illustration.

A has moveable shutters, which are opened at his convenience from time to time to admit light. The right to light would, under such circumstances, be gained at the end of 20 years, provided that no such interruption takes place on the part of the servient owner as is contemplated in sect. 4 (see § 28).[3]

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[1] There may have been no interruption on the part of others, but the user may have been intermittent to such an extent as to negative the enjoyment "as of right" required by the Act, or may have been subject continuously or at times to the licence or permission of the servient owner.

[2] *Hollins* v. *Verney*, 11 Q. B. Div. 715; App. 13 Q. B. D. 304; 53 L. J. R. Q. B. 430; and observations of Baron Parke in *Lowe* v. *Carpenter*, 6 Exch. 825, referred to in it. (A case of a right of way used for removing timber at intervals of several years.)

[3] *Cooper* v. *Straker*, 40 Ch. D. 21; 58 L. J. R. Ch. 26.

§ **33.** If the enjoyment has extended to a period of forty years as of right[1] and without interruption, the right to the easement becomes absolute, and may not be defeated by any such defences[2] unless the enjoyment has been had by agreement in writing.

Illustration.

A and her predecessors in title had from time immemorial made use of a way over B's premises to get from the road to A's premises, and had also made use of a pump in B's premises since 1855. A had made an annual payment of 15*s.*, and had contributed to the repairs of the pump. Held, on action by A in 1900 to establish the easement of way which was disputed by B, that though the enjoyment had not been by agreement in writing, yet the payment indicated that the way had been used by permission and not as of right, and that A had not established her right to the easement.[1]

§ **34.** In the case of a prescriptive right to light,[3] the actual enjoyment[3] of the access of light without interruption[4] for 20 years gives

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[1] *Gardner* v. *Hodgson's Kingston Brewery Co.*, (1900) 2 Ch. 198; 70 L. J. Ch. 504; 84 L. T. 373; 49 W. R. 421, C. A. H. L. 11th May, 1903, affirmed 72 L. J. Ch. 558.

[2] Sect. 2 of the Act.

[3] *Tapling* v. *Jones*, 11 H. L. C. 290; 34 L. J. C. P. 342.
Jordeson v. *Sutton, Southcoates and Drypool Gas Co.*, (1898) 2 Ch. 614; 67 L. J. Ch. 666.

[4] *Presland* v. *Bingham*, (App.) 41 Ch. D. 268.
Robson v. *Edwards*, (1892) 2 Ch. 46; 62 L. J. Ch. 378.

an absolute right, unless the right is limited by agreement in writing.[1]

Illustration.

A owned a conservatory, the windows of which overlooked B's property. In 1873 A agreed in writing to pay a shilling a year to B for this privilege of overlooking B's property. Payment was accordingly made till 1888. The successor in title of A brought an action for an obstruction by B of the light passing to the conservatory, which he claimed to enjoy as ancient; but it was held that the right had been limited by agreement in writing under this section, and that plaintiff had not acquired the right for the obstruction of which he claimed damages.[2]

§ **35.** "Interruption" does not include proved obstruction of a fluctuating or temporary character, unless acquiescence in such obstruction for the period required by the statute is also proved.[3]

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[1] Sect. 3 of the Act.
Bewley v. *Atkinson*, (App.) 13 Ch. D. 290; 49 L. J. Ch. 153.
Mitchell v. *Cantrill*, (App.) 37 Ch. D. 56; 57 L. J. R. Ch. 72.

[2] *Easton* v. *Isted*, (1903) 1 Ch. 405; 72 L. J. Ch. 189.
The words of the Act are, "unless it shall appear that the "same was enjoyed by some consent or agreement expressly "made or given for that purpose by deed or writing." These words have created great difficulty of interpretation. What is probably intended is, that to prevent the acquisition of an easement in such circumstances, there must be in writing something equivalent to an acknowledgment by the dominant owner that the enjoyment is permissive.

[3] Sect. 4 of the Act.
Presland v. *Bingham*, (App.) 41 Ch. D. 268.

Illustration.

Obstruction of A's ancient lights by B, by raising a party-wall 15 feet above its original height. B pleaded that for several years prior to the completion of the 20 years, he had obstructed the light to a greater extent by piling up empty packing cases. It was proved, however, that the packing cases were subject to constant removal, some to be returned, some to be broken up. Held (in appeal) that there had been no interruption, within the 4th section, of plaintiff's enjoyment of light.[1]

§ 36. The "access" of light means the passage of light through a definite and permanent channel.[2]

Illustration.

A builds a structure for storing and exhibiting timber, the two ends of the lower parts of the sides being left open to afford access of light and air to the timber. The way in which the timber was laid varied from time to time, and the channel for the receipt of light and air was therefore indefinite and constantly varying. This mode of enjoyment of light did not satisfy the requirements of the statute for the acquisition of the easement of light.[2]

To enable the time to commence to run it is not necessary that the house should have been completed and become fit for habitation. It is sufficient if the apertures through which the right to the access of light is claimed were already made and defined, though not completed.

Cortauld v. *Legh*, 38 L. J. Exch. 45, and *Collis* v. *Laugher*, (1894) 3 Ch. 659; 63 L. J. Ch. 851, which followed and applied *Cortauld* v. *Legh*.

[1] *Presland* v. *Bingham*, (App.) 41 Ch. D. 268.

[2] *Harris* v. *De Pinna*, (App.) 33 Ch. D. 238; 56 L. J. Rep. Chanc. 344.

§ **37.** No presumption of enjoyment for the term of 20 years, or of 40 years, can be made from any shorter term of enjoyment shown to have been had.

§ **38.** "The time during which any person, "otherwise capable of resisting any claim to "any of the matters before mentioned, shall "have been or shall be an infant, idiot, *non* "*compos mentis*, *feme covert*,[1] or tenant for life, "or during which any action or suit shall have "been pending, and which shall have been "diligently prosecuted until abated by the "death of any party or parties thereto, shall "be excluded in the computation of the periods "hereinbefore mentioned, except only in cases "where the right or claim is hereby declared "to be absolute and indefeasible."[2]

§ **39.** "When any land or water upon, over, "or from which any such way or other 'conve- "nient water-course'[3] or use of water shall "have been or shall be enjoyed or derived "hath been or shall be held under or by virtue "of any term of life or any term of years

[1] *I.e.*, "a woman with matrimonial incapacity for contracting." But the disability no longer exists. See 45 & 46 Vict. c. 75.

[2] Sect. 7 of the Act.

[3] Error for "easement or any water-course."

"exceeding three years from the granting "thereof, the time of the enjoyment of such "way or other matter as herein last before "mentioned during the continuance of such "term shall be excluded in the computation of "the said period of 40 years, in case the claim "shall within three years next after the end or "sooner determination of such term be resisted "by any person entitled to any reversion "expectant on the determination thereof."*

Illustrations to Sect. 4 of Prescription Act.

(*a.*) A brings a suit against B claiming an easement to a way over the tenement of B, in the exercise of A's right to which A alleges that he has been resisted by B.

B has brought no suit for trespass, but as A has brought this suit he may establish his right to the easement, if he can show that he has had enjoyment for the required term of 20 years next preceding the suit, without interruption submitted to or acquiesced in by A, for one year after A had notice of the act of interruption from B.[1]

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* Sect. 8 of the Act.

The words "any person entitled to any reversion expectant "on the determination thereof" include a tenant at will to the owner of the reversion, according to the view taken by the Division Court in *Laird* v. *Briggs*, 16 Ch. Div. 440. The Appellate Court, however (19 Ch. Div. 22), declined to express an opinion on this point, and intimated that they must not be taken to agree with the construction so placed on sect. 8.

In *Symons* v. *Leaker*, 15 Q. B. D. 629; 54 L. J. R. Q. B. 480, it was held that the word "reversion" is to be read in its strict legal signification, and does not include "remainder."

[1] *Wright* v. *Williams*, 1 M. & W. 77; 5 L. J. N. S. Exch. 107. *Richards* v. *Fry*, 7 A. & E. 698; 7 L. J. N. S. K. B. 68.

(*b.*) In the same case B shows that the interruption was a period next preceding the suit, and argues that therefore the enjoyment does not satisfy the requirements of the Prescription Act, as the enjoyment must be next preceding the suit.

A, however, may recover in this case, provided that he has enjoyed without interruption for 19 years and one day, followed immediately by an interruption for a term of not more than 364 days immediately before the suit, since this interruption, being less than one year, is by section 4 not to be deemed an interruption, and the enjoyment has therefore been had for 20 years next preceding the suit.[1]

Illustrations to Sect. 7.

(*a.*) In the same circumstances B pleads and proves disability in that he was an infant for 14 out of the 20 years next preceding the suit. A cannot recover.

(*b.*) In the same circumstances B pleads and proves that B's father was during two years out of the 20 years of enjoyment by A diligently prosecuting a suit against A for trespass, which suit abated on the death of B's father at the end of the two years, and during the period of B's infancy. A cannot recover.

(*c.*) A brings an action of trespass against B in regard to the use of a way over A's land. B claims an easement of way by user for more than 20 years next preceding the suit. A replies that a life estate for 5 years was interposed between the first 10 years and the last 5 years of enjoyment. But B shows that he has enjoyed for full 25 years preceding the suit, or, deducting

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[1] *Flight* v. *Thomas*, 11 A. & E. 688; 10 L. J. Exch. 529; affirmed in H. L.: 8 Cl. & F. 231.

No interlocutory injunction will, however, be granted to restrain obstruction of the access of light that has not been enjoyed for the full period of 20 years. *Lord Battersea* v. *Commissioners of Sewers for the City of London*, (1895) 2 Ch. Div. 708; 65 L. J. Ch. 81.

Governors of Bridewell Hospital v. *Ward, Lock, Bowden & Co.*, 62 L. J. Ch. 270.

the life estate, for 20 years, as required by the statute. A cannot recover.[1]

(*d.*) In a claim by A to the absolute right to an easement under an enjoyment for 40 years, B pleads and shows that he was an infant for 14 years of the period, and that for 2 years of the period preceding this period of infancy his father was diligently prosecuting a suit for trespass against A, which suit abated on the death of B's father at the end of the two years.

These periods are not to be deducted, and A can recover if he shows an enjoyment for the full period of 40 years next preceding the suit brought by him.

Illustrations to Sect. 8.

(*a.*) In a claim by A to the absolute right to an easement under an enjoyment of 40 years, B pleads and proves that the enjoyment of A was first for 20 years followed by a lease for 15 years, and after the determination of the lease by an enjoyment of 16 years next preceding the suit, and that within 3 years following the determination of the lease for 15 years he brought an action for trespass against A.

Here, although the entire period is 51 years, the term of the lease must be deducted, and the entire term of enjoyment is reduced to 36 years. A cannot recover.

(*b.*) In a claim by A to the absolute right to an easement under an enjoyment of 40 years, B pleads and proves that the enjoyment of A was first for 20 years, followed by a lease for 15 years, and after the determination of the lease by an enjoyment for 16 years next preceding the suit; but he fails to show that within 3 years following the determination of the lease he brought any action against A. The term of the lease therefore is not deducted from the period of enjoyment by A. A may recover.

§ 40. Except in the case of "Light," an easement cannot be acquired under the Pre-

[1] This was held to be the correct construction of the section in *Clayton* v. *Corby*, 2 Q. B. 813; 11 L. J. Q. B. 239.

scription Act if the circumstances are such that no interruption of the enjoyment by reasonable means is possible.

Illustrations.

(*a.*) A works mines under B's land without leaving any support to the surface land. A claims to have acquired a right by prescription so to work the mines as to leave no support to the surface land of B. As no act is done upon the surface which B can resist or interrupt, the right claimed cannot be gained.[1]

(*b.*) A has for more than 20 years continued to place cinders in heaps upon his land abutting on a stream; the cinders are at last carried down the stream and damage the mill of B. A defends the action by saying that he has acquired a prescriptive right so to place the cinders as to risk their being carried down and damaging B's mill.

As, however, B has had no power of resisting or interrupting the practice of placing cinders on the bank of the stream, A cannot maintain his claim to a prescriptive right, and his defence is not sustainable.[2]

(*c.*) B has a mine, and with a view to get rid of an obstacle to the working of the mine he makes a channel by which he drains the mineral area in which the ores lie. This channel and the flow of water through it are continued for the convenience of the mining operations for many years, and A applies the stream after it issues from the mine to the purpose of turning his mill. He continues to do so for more than 20 years. At length, from the mineral ore above the level of the stream becoming exhausted, the flow of water through the channel ceases. A brings an action against B, claiming a prescriptive right to the continued flow of the stream.

B could not have interrupted the enjoyment of the stream by

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[1] *Blackett* v. *Bradley*, 1 B. & S. 940; 31 L. J. Q. B. 65.

[2] *Murgatroid* v. *Robinson*, 7 E. & B. 391; 26 L. J. Q. B. 233.

A except by going to enormous expense in providing for the water a different exit.

On this, among other grounds (see § 2), therefore, A cannot maintain his claim to a prescriptive right.[1]

§ 41. Except in the case of light, an easement under a claim of 20 years' enjoyment cannot be acquired under the Prescription Act if at the commencement of the period of 20 years the servient owner was, by reason of incapacity,[2] disabled from making a grant, or was otherwise not in a position to transfer a present interest in the property, such as would have rendered him capable of interrupting or resisting the user.

Illustrations.

(*a.*) A claims an easement of way over the land of B. B, prior to the date at which the enjoyment is said to have first commenced, had leased the land over which the way is claimed, to C.

At the time, therefore, at which the enjoyment commenced, B had no power to make a grant of the right of way. No pre-

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[1] *Arkwright* v. *Gell*, 5 M. & W. 203; 8 L. J. N. S. Exch. 201.

[2] See the section on "Capacity." A prescriptive right equally at common law and, except in the case of light, under the Act, proceeds upon the presumption of a grant, and in all cases requires that the easement should have been enjoyed without interruption, thus presupposing a power of interruption and resistance.

See as to this, *Harbridge* v. *Warwick*, 3 Exch. 552; 18 L. J. Exch. 245. But see also *Simper* v. *Foley*, 2 Joh. & H. 555.

sumption of a grant to A can arise, and A has not acquired the easement claimed.

(*b.*) If, however, the enjoyment began before the lease, and was continued during its term and afterwards, a grant may be presumed and a prescriptive right under the Act may be acquired.[1]

§ 42. To enable a prescriptive right to be acquired under the 2nd section of the Act the easement must have been actually enjoyed by the person claiming right thereto.[2]

Illustrations.

A was owner of a strip of land which had on *one side* of it a wall, and beyond the wall some other land of A, and on the *other side* of it some land of B. In 1855, B had agreed to lay out this strip as a street. From 1856 to 1881, some sheds built by B as workshops had stood on the strip, with gables resting on the wall. In 1864, B had *covenanted* with A to lay out the strip of land as a street. A had, in 1861, conveyed to C the wall and property on the other side of the wall. In 1877, A had conveyed to B the site of the intended street. In 1881, C pulled down part of this wall, thus destroying B's shed. Held, that up to 1877 B's enjoyment of support by the wall was precarious, not as of right, but on sufferance, and that he had not enjoyed for twenty years, as of right, as required by the section.[3]

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[1] See *suprà*, sects. 7, 8 of the Act.

[2] These words "actually enjoyed by any person claiming right thereto" in sect. 2 of the Act have been held to mean "actually enjoyed as of right." (*Tickle* v. *Brown*, 4 A. & E. 369.) But even though shown to have been so enjoyed, the claim, except in the case of light, is liable to be defeated by the common-law defences mentioned in p. 22, *ante*.

[3] *Tone* v. *Preston*, 24 Ch. Div. 739; 53 L. J. Rep. Ch. 50.

A enjoys the convenience of a way over B's close, but takes care that B has no knowledge that he uses it.

A enjoys the convenience of a way over B's close, but is careful on each occasion to ask and obtain B's permission.

A has always been interrupted and resisted by B in the exercise of his alleged right of way over B's close.

In all these cases, though A may have actually enjoyed as of right, his claim is liable to be defeated under the section by any of these common-law defences.

Of the Particular Classes of Natural Rights and of Rights of Easement.

§ **43.** A right in the use of unappropriated natural objects and forces, as air, flowing water, light, support, is called a natural right.

Of Rights in Water.

NATURAL RIGHTS TO THE USE OF WATER.

§ **44.** The owner of an estate or property on the bank of a natural and defined stream[1] flowing on the surface, or his agent or tenant, has a right to the reasonable use of the water of the stream, whether the use be in irrigation, in

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[1] There is no *property* in the water of a *natural* stream, except in the use of it in such reasonable quantity as is abstracted from it; and in that only so long as it is in possession.

See under §§ 49 and 62a as to Lord Halsbury's definition of a stream in *McNab* v. *Robertson*.

manufacturing purposes, or in other purposes of utility connected with the use of his tenement.[1]

He has no inherent right as such owner, agent, or tenant to obstruct[2] the water of the stream, or to transmit it, injured in quality,[3] or (in regard to quantity) diminished beyond an extent consistent with a reasonable use.

What is a reasonable use is in every instance a question dependent for its solution on the circumstances of the case.[4]

§ **45.** A riparian proprietor's right extends only to the defined stream, and not to that portion of the water which, though eventually by percolation or otherwise it may reach and supply the defined stream, does not as yet run in a defined stream.[5]

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[1] *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. Cases, 697.

[2] *Dudden* v. *Guardians of the Clutton Union*, 1 H. & N. 627; 26 L. J. Rep. Exch. 146.

[3] *Bailey* v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396.

[4] *Embrey* v. *Owen*, 6 Exch. 353; 20 L. J. Exch. 212.
Medway Navigation Co. v. *the Earl of Romney*, 9 C. B. N. S. 575; 30 L. J. C. P. 236.
Swindon Waterworks Co. v. *Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. Cases, 697; 45 L. J. Ch. 638.

[5] *Broadbent* v. *Ramsbotham and another*, 11 Exch. 603; 25 L. J. Exch. 115.

§ **46.** Mere diversion of water by an upper riparian proprietor above the boundary of the tenement of a riparian proprietor is not an injury to the right of the latter, if the water so diverted is returned to the stream before it reaches his tenement.[1]

§ **47.** The lower riparian proprietor may be injured by a more than reasonable use of the water having been made after diversion or before return.[2]

NATURAL RIGHT TO ACCUSTOMED FLOW.

§ **48.** Every upper and every lower riparian proprietor has a natural right to have the stream flow on in its accustomed course, unobstructed.[3]

Illustrations.

A, a lower riparian proprietor, dams up a stream flowing past B's grounds above to the grounds of A, and thereby diminishes

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[1] *Kensit* v. *Great Eastern Ry. Co.*, 23 Ch. D. 566; 52 L. J. Q. B. 688; and in App. 27 Ch. D. 122; 54 L. J. R. Ch. 19.

[2] *Embrey* v. *Owen*, 6 Exch. 353; 20 L. J. Exch. 212. *Wright* v. *Howard*, 1 Sim. & Stu. 190; 1 L. J. Ch. 94.

[3] *Wright* v. *Howard*, 1 Sim. & Stu. 190; 1 L. J. Ch. 94. *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148.

the fall of water to which B is entitled from the accustomed flow of the stream; or,

B, an upper riparian proprietor, dams up the water as it passes his grounds, and so affects the flow of it to the grounds of A, a lower riparian proprietor. In each of these cases the act of damming up the stream violates the natural right of B and A respectively to the accustomed and unobstructed flow of the stream.

§ **49.** The rules as to the RIGHT TO THE USE OF WATER AND TO ITS ACCUSTOMED FLOW apply also to such natural streams as flow in a known and defined course *below* the surface.[1]

They do not apply to *artificial* streams,[2] or to streams that do not flow on the surface, or in a known and defined course below the surface, but have their course in unknown and undefined channels.[3]

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[1] Implied in *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Exch. 81.

[2] As to when a stream alleged to be partly artificial is to be deemed a natural stream, see *Roberts* v. *Richards*, 50 L. J. Ch. 297.

[3] *Chasemore* v. *Richards*, 7 H. L. Cases, 349; 29 L. J. Exch. 81. Compare, as to this, Lord Halsbury's opinion, in *McNab* v. *Robertson*, of the meaning to be attached to the word "stream" in a case of a *grant* of an easement to a lessee, the subject of the grant being water in certain ponds, *and the streams leading thereto:* see note on § 62a.

NATURAL RIGHT TO PURITY OF WATER.

§ **50.** A proprietor by or through whose property a stream flows has a right, independent of an easement, to have the stream reach him in a condition of purity.[1]

This rule is equally applicable to all *natural*[2] streams, comprising

Defined or undefined surface streams;

Underground streams with known or defined courses; or,

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[1] *Wood* v. *Waud*, 3 Exch. 748; 18 L. J. Exch. 305.
Ballard v. *Tomlinson*, 29 Ch. D. 115;
App. 54 L. J. Rep. Ch. 454.
Young v. *Bankier Distillery Co.*, (1893) A. C. 691.

It follows that a proprietor has no right to pollute a stream to the prejudice of one to whose property it flows, unless he has a right of easement so to pollute it.

See *Bailey* v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396.

[2] *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J. Q. B. 231.

It is conceived that it is also applicable to all such *artificial* streams.

This seems to follow from the broad character of the ruling in *Whaley* v. *Laing*, in which it was held that when a person is in possession of an artificial stream, although he has as yet acquired no right of easement in it, nor any prescriptive right to its uninterrupted flow, yet as against a person who, in the absence of a right of easement, pollutes it to his detriment, he is injured by the pollution and may maintain an action for the injury.

Whaley v. *Laing*, 2 H. & N. 476; 26 L. J. Exch. 327;
and on appeal, 3 H. & N. 675; and 27 L. J. Exch. 422.
Bailey v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396.

Water percolating through the soil in unknown or undefined streams.[1]

NATURAL RIGHT TO GET RID OF OR APPROPRIATE SURFACE WATER.

§ **51.** A person whose property is flooded without any negligence of his, or on or under which water has casually collected, is entitled, in the absence of any obligation to the contrary,[2] to get rid of the water by letting it take its own course, or by draining it off.[3]

If he assists the subsidence of the water,[4] he must do so in such a way as not to prejudice the rights of others.[5]

§ **52.** A landowner has a right to appropriate surface water which flows over his land in no

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[1] *Wood* v. *Waud*, 3 Exch. 748; 18 L. J. Exch. 305.
Ballard v. *Tomlinson*, 29 Ch. D. 115; App. 54 L. J. Rep. Ch. 454.
Young v. *Bankier Distillery Co.*, (1893) A. C. 691.

[2] *Buckley* v. *Buckley*, (1898) 2 Q. B. 608, C. A.; 67 L. J. Q. B. 953.

[3] *Rawstron* v. *Taylor*, 11 Exch. 369; 25 L. J. Exch. 33.
A landlord may drain his land of water percolating through it, though in so doing he draws off the supply of his neighbour's springs, and this irrespective of object or purpose. *Mayor, Aldermen and Burgesses of Bradford* v. *Pickles*, (1895) A. C. 587; H. L. 64 L. J. Ch. 759.

[4] As by cutting trenches or otherwise.

[5] *Whalley* v. *Lancashire and Yorkshire Ry. Co.*, 13 Q. B. D. 131; 53 L. J. Q. B. 285.

definite channel, although the water is thereby prevented from reaching a watercourse which it previously supplied.[1]

§ **53.** A riparian owner cannot, except as against himself, grant a user of the water to one who is not a riparian proprietor, and any user by such person, whether under such grant or not, is wrongful, save as against the grantor, if it sensibly affects the quality or the flow of water passing by the lands of riparian proprietors.[2]

OF EASEMENTS IN WATER BY GRANT AND BY PRESCRIPTIVE RIGHT.

§ **54.** Easements may be acquired in water in streams whether natural or artificial, and whether constant or intermittent in flow, and also in ponds, tanks and other collections of water which have no flow or no appreciable flow.

§ **55.** Easements may be acquired by *express* grant to collections of or streams of water, whether natural or artificial, whether flowing

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[1] *Broadbent* v. *Ramsbotham*, 11 Exch. 602; 25 L. J. Exch. 115.

[2] *Ormerod* v. *Todmorden Joint Stock Mill Co.*, App. 11 Q. B. D. 155; 52 L. J. Q. B. 445.

or not, whether surface or percolating, whether defined or undefined in course, and whether constant or intermittent; but by prescription they may not be acquired over any streams but those having *defined* courses, nor over any collections of water but those which are permanent.[1]

Illustration.

There is a swamp on A's ground from which for more than 20 years water has percolated through the ground to a defined stream which it has thus supplied.

A may drain off the swamp; and B and others who claim a prescriptive right in the defined stream cannot claim that A should leave the swamp standing on his ground.[2]

§ **56.** Where water has been conducted into a defined channel with a flow of a permanent character by artificial means, rights to the use of it may be acquired by grant or by prescription.[3] Whether the flow is of a permanent character is a question of fact.

§ **57.** The character of the stream may be

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[1] *Gaved* v. *Martyn*, 19 C. B. N. S. 732.

[2] *Rawstron* v. *Taylor*, 11 Exch. 369; 25 L. J. Exch. 33.

He must, however, get rid of the water with due care, so as not to cause injury to others' property. See § 51, *suprà*.

See *Whalley* v. *Lancashire and Yorkshire Ry. Co.*, 13 Q. B. D. 131; 53 L. J. Q. B. 285.

[3] *Powell* v. *Butler*, 5 Ir. R. C. L. 309, C. P.

Bailey v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396.

permanent although intermittent;[1] or whether intermittent or not it may want the character of permanency.[2]

§ **58.** The right to the uninterrupted flow of water in a permanent artificial stream may be acquired both against the originator of the stream and any person over whose land the water flows.

If the artificial stream is of a temporary[3] character, no right to the uninterrupted flow of it can be acquired against the originator.

Though the artificial stream is of a temporary character, and no right to the continuance of the flow can be acquired against the originator of it, yet while and so long as the water continues to be transmitted by the originator, such a right may be acquired by prescription against those through whose land the water has been accustomed to flow.[4]

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[1] As a water-course dug to supply a mill with water.

[2] As if a stream originates from the pumping of water from a mine.

Beeston v. *Weate*, 5 E. & B. 986; 25 L. J. Q. B. 115.

[3] *Hanna* v. *Pollock* (1900), 2 Ir. R. 664, C. A.

Burrows v. *Lang*, (1901) 2 Ch. 502; 70 L. J. Ch. 607.

[4] *Arkwright* v. *Gell*, 5 M. & W. 203; 8 L. J. N. S. Exch. 201.

Gaved v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353.

Greatrex v. *Hayward*, 8 Exch. 291; 22 L. J. Exch. 137.

But see now *Wheaton* v. *Maple*, referred to in note to § 11, *supra*.

§ **59.** The following rights may be acquired as easements in natural and artificial streams.

THE RIGHT OF EASEMENT TO OBSTRUCT AND DIVERT WATER.

§ **60.** If a person, whether riparian owner or not, has obstructed or diverted the water of a defined natural or defined permanent artificial stream, whether continuously or at regularly recurring intervals, for the period and under the other conditions required for the acquisition of easements by prescription, he may thereby acquire an easement against riparian owners affected by his conduct.

Illustrations.

(*a.*) A has at particular times in the year for 20 years continuously, by a cut in the bank and small channel, diverted the water of the river to his tenement at a distance from the bank of the river, on one of the banks of which, below the cut, B is a riparian proprietor.

A may thus acquire a right by prescription to divert the stream.[1]

If the stream is artificial *and temporary*, A can acquire no such right by so acting.

(*b.*) A has for 20 years obstructed and penned back a stream so as to prejudice an upper or lower riparian proprietor, or has for the same period caused the water to flow over the land of

[1] *Bealey* v. *Shaw*, 6 East, 209.
Wright v. *Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94.

such proprietor. A may in these cases acquire a title by prescription to continue so to act.[1]

THE RIGHT OF EASEMENT TO POLLUTE WATER.

§ **61.** A right to pollute water, and to transmit it in a polluted condition, may be acquired by prescription.[2]

§ **62.** A prescriptive right to foul a stream is only acquired after 20 years from the period at which the degree of pollution which is claimed commences to affect prejudicially the servient estate.[3]

OTHER RIGHTS OF EASEMENT IN STREAMS.

§ **62A.** Other rights of easement may be the subject of grant, according to the terms of the grant.[4]

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[1] *Wright* v. *Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94.
Bealey v. *Shaw*, 6 East, 209.
Mason v. *Hill*, 3 B. & Ad. 304; 1 L. J. N. S. K. B. 107.
Stockport Water Works Co. v. *Potter*, 7 H. & N. 160; 31 L. J. Exch. 9.
Holker v. *Porritt*, 8 L. R. Exch. 107; 42 L. J. Exch. 85; L. R. 10 Exch. 59; 44 L. J. Exch. 52.

[2] *Bailey* v. *Clark*, (1902) 1 Ch. 649; 71 L. J. Ch. 396.

[3] *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. Ap. 349; 35 L. J. Ch. 382.
See the effect of alteration of mode of enjoyment, §§ 128 and 129.

[4] *McNab* v. *Robertson*, (1897) A. C. 129; 66 L. J. P. C. 27.

Illustration.

A lessor, A, granted to his tenant, B, the right to the water in certain ponds "and in the streams leading thereto." Some of the water in the soil abutting on the premises demised, and which would have reached the ponds, was intercepted by a tiled drain. Held that the water thus intercepted was not a stream, and therefore not within the grant.[1]

Of Rights of Way.

EASEMENTS OF WAY.

§ **63.** Public rights of way are those which every member of the community enjoys of passing from one place to another by public passages and ways.

Public rights of way do not depend upon the situation of a tenement, and are not easements.

§ **64.** Private rights of way are abridgments of the natural right of an owner of landed property to exclude all persons from his property.

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[1] *McNab* v. *Robertson*, (1897) A. C. 129; 66 L. J. P. C. 27.

Lord Halsbury, Chancellor, dissented from this view. His opinion was that, though the word "stream" in its more usual application does imply water running between defined banks, it is not confined to that meaning, its essence being that it is water in motion, as distinguished from stagnant water.

They appertain to a person, or a body of persons, either for the purpose of passing generally, or for the purpose of passing to and from a particular tenement of which such person or persons may be possessed.

Such private rights of way as appertain to persons without reference to a tenement are not acquired for use of a tenement, and are not, therefore, easements. Those which are used for any of the above purposes in relation to a tenement are easements.

An owner of land adjoining a public highway has a right of way to it from his land.[1]

Illustration.

A's land adjoined what had for many years been a public footway and esplanade to which he had always enjoyed access. This public way was vested in a local board, who erected a fence which shut him out from access to it. A had the right of access to the highway, and an injunction was granted to compel the removal of the fence.[2]

§ **65.** An easement of way may be general, that is, usable for all purposes connected with passing to or from the dominant tenement; or limited to a particular mode of user. It may

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[1] This appears to be a right arising by situation, and is not an easement.

[2] *Ramsey* v. *Southend Local Board*, 67 L. T. 169.

be limited to particular occasions, or hours, or times of the year.[1]

§ **66.** The owner of a private easement of way in the absence of special terms in the grant, if it is in writing,[2] can only enter upon that way at either extremity, and not at any intermediate point.[3]

§ **67.** A right of way appurtenant to a tenement can only be used for the purpose of passing and repassing to and from the tenement.

Illustration.

A possesses a tenement near a highway, and has a private right of way over the land intervening between the highway and his tenement. He has also some land at a spot still further from the highway, where he is about to build a house. He conveys bricks and other materials for building his house by the private way, first to the tenement to which he possesses the right of way, and afterwards thence to the spot at which he is about to build a house.

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[1] *Bradburn* v. *Morris*, 3 Ch. D. 812.
Cowling v. *Higginson*, 4 M. & W. 245; 7 L. J. N. S. Exch. 265.
Ballard v. *Dyson*, 1 Taunt. 279.
A right of way to be capable of being established must be properly defined, its limitations being sufficiently deducible from the terms of an express grant, or from the implied grant or implied reservation, or from its definite use.
Metropolitan Ry. v. *Great Western Ry.*, (1901) 84 L. T. 333, C. A.

[2] See *Cooke* v. *Ingram*, 3 Rep. 607; 68 L. T. 671.

[3] *Woodyer* v. *Haddon*, 5 Taunt. 125, see at p. 132.

In an action brought for damages for unauthorized use of the way, it is a question upon these circumstances whether the way was used for the purposes of the dominant tenement.[1]

§ **68.** The use of a private right of way to reach a highway, between which and the dominant tenement it lies, is a use proper to the purpose of passing from the dominant tenement, whatever may be the ultimate purpose which the occupier has in reaching the highway.[2]

§ **69.** Ways which are appurtenant to a tenement may be acquired by express grant, by implied grant, or by prescription.

§ **70.** Such a right may be acquired by express grant,

(*a.*) When the vendor of real property assigns a right enjoyed by him over the neighbouring tenement of a third person:

(*b.*) When the vendor of real property grants the vendee a right of way over a part of such portion of his property as the vendor retains.

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[1] *Skull* v. *Glenister*, 16 C. B. N. S. 81; 33 L. J. C. P. 185. *Clifford* v. *Hoare*, L. R. 9 C. P. 362; & 43 L. J. C. P. 225.

[2] *Colchester* v. *Roberts*, 4 M. & W. 769; 8 L. J. N. S. Exch. 195.

As to acquisition by implied grant:—

§ **71.** If a dominant tenement is divided between two or more persons, a right of way appurtenant thereto becomes appurtenant by implied grant to each of the severed portions, provided that such distribution of the easement is not at variance with the actual or presumed grant under which the right has been acquired.[1]

§ **72.** A way of necessity over the land of the

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[1] *Codling* v. *Johnson*, 9 B. & C. 933; 8 L. J. K. B. 68.
Bower v. *Hill*, 2 Bing. N. C. 339; 5 L. J. N. S. C. P. 17; and see § 105.

Except in the case of ways of necessity such conveniences of way would not, prior to the Conveyancing Act of 1881 coming into force (1 January, 1882), pass to the vendee as appurtenant to the property sold to him; unless it expressly appeared by the conveyance that such rights of way as were previously enjoyed in connection with the reserved tenement were intended to be conveyed. But now language to that effect need not appear in the conveyance.

As to what language has been held to convey conveniences used prior to the severance of tenements,

See *Whalley* v. *Thompson*, 1 B. & P. 371.
Barlow v. *Rhodes*, 2 L. J. N. S. Exch. 91.
Geogheghan v. *Fegan*, 6 Ir. R. C. L. 139, Exch.
Kay v. *Oxley*, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210.
Bayley v. *The Great West. Ry. Co.*, (App.) 26 Ch. D. 434.

In *Barkshire* v. *Grubb*, 18 Ch. D. 616, the way appears to have been a way of necessity, and it is not apparent why a rectification of the conveyance was called for by the insertion of general words expressing that rights of way previously enjoyed were intended to be conveyed.

grantor is implied when there is no other way to the tenement purchased except by passing through the tenement of the grantor from which the tenement purchased is severed, or by trespassing on that of a stranger.[1]

Illustrations.

A enfeoffs B of an acre of land in the middle of and encompassed by other lands of A. B has a way of necessity over A's lands surrounding the acre granted.[2]

A sells B a house and ground with a way through the premises leading to A's mews at the back. A has no way to the mews except over the property granted to B. A has a way of necessity over B's property.[3]

§ **73.** No grant can be implied of a way of necessity through the tenement of a stranger.[4]

§ **74.** When the land reserved by a grantor on severance of tenements is on all sides sur-

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[1] *Serff* v. *Acton Local Board*, 31 Ch. D. 679; 55 L. J. R. Ch. 569.

[2] *Oldfield's Case*, Noy's Rep. 123.

[3] *Davies* v. *Sear*, L. R. 7 Eq. 427; 38 L. J. Ch. 545.

This was a case of implied reservation. The plaintiff, the grantor, had a mews adjoining the land sold. There was another way to it, but the defendant, to whom the land was sold on which the particular way in question was, had notice that, under an existing contract, the other way would have to be closed, leaving the way in question as the only access to the grantor's ground.

[4] *Menzies* v. *Breadalbane* (No. 2), 4 F. 59, Court of Sessions (1902).

rounded by the land granted, or is otherwise only capable of being reached over the land granted, a way of necessity over the land granted is impliedly reserved.[1]

§ **75.** When a right to a way of necessity arises in favour of grantor or grantee, he has a right to take the most convenient way.

Illustration.

"A had an acre of land which was in the middle and encom-
" passed with other of his lands, and enfeoffs B of that acre.
" B has a convenient way over the lands of the feoffor, and is
" not bound to use the same way that the feoffor uses," but may take any way convenient to the grantee.[2]

§ **76.** The way once ascertained cannot be altered.[3]

§ **77.** Although ordinarily the owner of a private right of way is not authorized to deviate

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[1] *Pinnington* v. *Galland*, 9 Exch. 1; 22 L. J. Exch. 348.

[2] *Oldfield's Case*, Noy's Rep. 123.

[3] *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761; 4 L. T. N. S. 769.

This rule does not, of course, affect rights arising out of the special terms of an express grant, as was the case in *Cooke* v. *Ingram*, where the right of access to a private way over land of the grantor from land conveyed to the grantee was granted "to and from every or any part of the parcels" conveyed to the grantee. 3 Rep. 607 (1893); 68 L. T. 671.

from the particular road used, in exercise of the right, even though it is out of repair, yet if the right of way is rendered incapable of exercise by the act of the grantor, he may take a different route over the grantor's ground.

Illustration.

A has a right of way for a horse and cart over B's ground. B contracts the width of the road and renders impracticable the exercise of A's right. A may take a different route over B's ground.[1]

§ **78.** A private right of way cannot be acquired over a public road already in existence on a date previous to the date at which, either by grant or by prescription, the private right would otherwise be acquired.

Illustration.

A uses a private way in the grounds of B for 18 years and 11 months in such a manner that if he continued to do so for the full period required by the statute he might acquire a private right of way. But at the end of the 18 years 11 months a public right of way is acquired over the same ground. A cannot acquire the private right of way.[2]

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[1] *Hawkins* v. *Carbines*, 27 L. J. Exch. 44.
Selby v. *Nettlefold*, L. R. 9 Ch. 111; 43 L. J. R. N. S. Ch. 359.

[2] The entire interest of B in the servient tenement is dedicated to the public. Nothing remains, therefore, in B which might be presumed to have been granted to A if he went on to complete the 19 years and one day of uninterrupted user. See p. 42, Illustrations to § 4 of Prescription Act.
See *Regina* v. *Chorley*, 12 Q. B. 515, and § 121, p. 90.

Of Rights in Air.

NATURAL RIGHTS IN AIR.

§ **79.** There is no natural right to the uninterrupted flow of air to a tenement from an adjoining tenement.

§ **80.** The owner of every tenement has a right to receive *vertically* the air appertaining to the situation of the property.[1]

The owner has a right to the free enjoyment and use of such air as *comes* to him laterally or vertically.

Everyone is entitled to claim that the air which passes his tenement shall not be polluted.[2]

"Unpolluted air" means air of such a degree of purity that it is not rendered incompatible with the physical comfort of human existence.[3]

The right to purity of air is qualified as below:

Operations actually necessary for trade and

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[1] *Aldred's Case*, 9 Coke, 58 b.
Walter v. *Selfe*, 4 De Gex & Sm. 315; & 20 L. J. Ch. 434.
Bamford v. *Turnley*, 3 B. & S. 66; 31 L. J. Q. B. 286.
St. Helen's Smelting Co. v. *Tipping*, 11 H. L. C. 642; 35 L. J. Q. B. 66.

[2] *Crump* v. *Lambert*, L. R. 3 Eq. p. 413.

[3] *Walter* v. *Selfe*, 4 De Gex & Sm. 315; & 20 L. J. Ch. 434.
Tipping v. *St. Helen's Smelting Co.*, L. R. 1 C. A. 66.

commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large, may lawfully be carried on if they do not pollute the air so as to cause material injury to property, or health or comfort.

In determining whether the wrong is actionable, consideration must be had of the circumstances in which the annoyance is caused, and whether the discomfort and annoyance are trifling, or such as to interfere seriously with the ordinary comfort of human existence.[1]

Pollution of the atmosphere by any person is not excused by the fact that it is more or less polluted by others.

RIGHTS OF EASEMENT IN AIR.

§ **81.** A right to the uninterrupted flow of air can be acquired as an easement by grant[2] express or implied. It can be acquired also by prescription at common law,[3] but not under the Prescription Act.[4]

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[1] *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 142.

[2] *Crossley* v. *Lightowler*, L. R. 2 Ch. Ap. 478; 36 L. J. Ch. 584.

[3] *Bass* v. *Gregory*, 25 Q. B. D. 481; 59 L. J. Q. B. 574.

[4] *Webb* v. *Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841; 30 L. J. C. P. 384; 31 L. J. C. P. 335, Exch. Cham. But see note with reference to this case in p. 27. *Hall* v. *Lichfield Brewery Co.*, 49 L. J. Ch. 655.

Illustration.

The cellar of A's public-house had been ventilated for forty years by a shaft cut through a road into a disused well in an adjoining yard. The enjoyment had been without interruption, and with the knowledge of the occupiers of the yard. Held, that A could claim the easement, and that a lost grant of the right ought to be inferred.[1]

§ 82. A right to pollute air may be acquired by grant or by prescription under the Prescription Act.[2]

But see § 24, *ante*, and foot note; also the observations of Lord Selborne (Chancellor) noted at page 32, which afford strong ground for questioning the correctness of the opinion of Erle, C. J., in *Webb* v. *Bird*, restricting the application of the Prescription Act to easements of ways and water.

[1] *Bass* v. *Gregory*, 25 Q. B. D. 481; 59 L. J. Q. B. 574.

But such a right can only be acquired if it be claimed through a defined passage.

In *Harris* v. *De Pinna*, L. R. 33 Ch. D. 238, the opinion was expressed that the access of air had not been through a sufficiently definite channel to entitle plaintiff to the right. He claimed it to a structure erected for storing timber open at both ends. The apertures for the reception of air varied with the mode of storing the timber. And the later cases bear out this view, viz.:

Aldin v. *Latimer, Clark, Muirhead & Co.*, (1894) 2 Ch. 437; 63 L. J. Ch. 601.

Chastey v. *Ackland*, (1895) 2 Ch. 389; (App.) 64 L. J. Q. B. 523; (1897) A. C. 155; 66 L. J. Q. B. 518.

[2] *Elliotson* v. *Feetham*, 2 Scott, 174.

Flight v. *Thomas*, 2 P. & D. 531; 10 A. & E. 590.

Crump v. *Lambert*, L. R. 3 Eq. 413.

Of Rights to Support.

THE NATURAL RIGHT TO SUPPORT.

§ 83. In the absence of a binding engagement to the contrary, and subject to the exception stated in § 85A, every man having land adjoining[1] or over[2] that of another has a natural right to require the other to continue the support afforded by the soil of his land.[3]

It is immaterial whether the grant to the land is of a public or private nature.

The grantee is not entitled to more support for his soil than is necessary to prevent it, if unburdened with buildings, from falling in.[4]

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[1] *Wyatt* v. *Harrison*, 3 B. & Ad. 871; 1 L. J. N. S. K. B. 237. *Hunt* v. *Peake*, Joh. 705; 29 L. J. Ch. 785.

[2] *Humphreys* v. *Brogdon*, 12 Q. B. 739; 20 L. J. Q. B. 10. *Smart* v. *Morton*, 5 E. & B. 30; 24 L. J. Q. B. 261. *Harris* v. *Ryding*, 5 M. & W. 60; 8 L. J. N. S. Exch. 181. *Rowbotham* v. *Wilson*, 8 H. L. Cases, 348; 30 L. J. Q. B. 49. *London & N. W. Ry.* v. *Evans*, (1893) 1 Ch. 16; 62 L. J. Ch. 1. *Bell* v. *Earl of Dudley*, (1895) 1 Ch. 182; 64 L. J. Ch. 29. *Earl of Westmoreland* v. *The New Sharleston Collieries Co.*, 80 L. T. 846.

[3] If one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself *sine quo res ipsa haberi non debet*.

Per the Lord Chancellor (Selborne) in *Dalton* v. *Angus*, 6 H. L. p. 791.

[4] See cases referred to *suprà*, in notes [1] and [2].

§ **84.** The obligation is to abstain from interrupting the ordinary enjoyment of land.[1]

The right and obligation continue the same though buildings have been erected.[2]

§ **85.** A right of action for disturbance of the right dates from the period at which sensible damage is sustained,[3] or from any later period at which other damage occurs from the same injurious cause.

Illustration.

A, in working coal under B's land, caused a subsidence of the surface land between 1868 and 1871, and by agreement repaired the mischief. No further working of coal took place there, but

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[1] Excavation, therefore, may proceed to the fullest extent, so long as disturbance does not take place.

Mitchell v. *Darley Main Colliery Co.*,
14 Q. B. D. 125 & 11 App. Ca. 127;
(App.) 53 L. J. Q. B. 471;
& (H. L.) 55 L. J. Q. B. 529.

If it is clear that the right to support is being imperilled, the party liable to be injured may obtain an injunction against further excavation.

Edinburgh and District Water Trustees v. *Clippens Oil Co.*,
(1901) 3 F. 156, Ct. of Sess.

[2] *Wakefield* v. *Duke of Buccleuch*, L. R. 4 Eq. 613;
36 L. J. Ch. 763.

An action therefore lies against a person if the excavation of the adjacent or subjacent soil by him causes subsidence of land after buildings have been erected on it, provided that the excavation would have caused it to sink in the same manner had no buildings been erected.

[3] *Bonomi* v. *Backhouse*, 9 H. L. Cases, 503; 34 L. J. Q. B. 181.

in 1882 there was a further subsidence attended with damage. An action was brought by B for this later damage.

It was held (H. L.) that a fresh cause of action arose when the damage occurred in 1882.

Lord Halsbury, L. C., Lord Bramwell, and Lord Fitzgerald; *dissentiente* Lord Blackburn.[1]

§ 85A. Companies governed by the Railway Clauses Act, 1845, do not by purchasing the surface acquire a right to subjacent support.

THE RIGHT TO SUPPORT BY EASEMENT.

§ 86. A right of easement may be acquired by grant or prescription to the support of *buildings* by the adjacent or subjacent soil.

There is no natural right to such support.[2]

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[1] *Mitchell* v. *Darley Main Colliery Co.*, L. R. 14 Q. B. D. 125; 53 L. J. Rep. Q. B. 471; in appeal H. L., L. R. 11 App. Ca. 127; 55 L. J. R. Q. B. 529.

The subsidence in the later instance of it would appear to have depended entirely on the injury which caused the subsidence between 1868 and 1871; but the effects of the injury were not fully manifested until 1882, when the further subsidence took place. The mischief which led to the subsidence must still have continued at work after the repairs in 1871, although the ultimate effects were staved off until 1882. It was one continuous injury, in the opinion of Lord Blackburn.

[2] *Rogers* v. *Taylor*, 2 H. & N. 828; 27 L. J. Exch. 173.

Rejecting the opinions of Pollock, C. B., and Watson, B., and following that of Cockburn, C. J.

See also, at § 25 note, *suprà*, observations as to the case of *Dalton* v. *Angus*, 6 App. Ca. 740; 50 L. J. Q. B. 689.

The conditions under which the easement may be acquired by prescription are set out in the section on that subject.

A grant of land for the purpose of building implies a grant of a right to support for such buildings as the contemplated use of the land may require;[1] and a subsequent purchaser of adjoining land from the grantor will be bound by the implied grant.[2]

§ **87.** When two contiguous buildings have been built simultaneously, and so as to derive support from each other, a right to the support of one of them by the other will be acquired as an easement by implied grant or implied reservation on the grant of one of them by the owner of both.[3]

§ **88.** Where houses belonging to different owners have been built contiguously, and have become *ancient*, there is a right of support of

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[1] See *Dalton* v. *Angus*, 6 App. Ca. (H. L.) at p. 792.

[2] *Rigby* v. *Bennett*, 21 Ch. D. 559, C. A.

One who conveys a house does by implication and without express words grant to the vendee all that is necessary and essential for the enjoyment of the house, and cannot derogate from his grant by using his adjoining land so as to injure what is necessary and essential to the house, as is the right of support from the adjoining soil.

Dictum of Lord Blackburn in *Dalton* v. *Angus*, 6 H. L. p. 826.

[3] *Richards* v. *Rose*, 9 Exch. 218; 23 L. J. Exch. 3.
Rigby v. *Bennett*, 21 Ch. D. 559, C. A.

each building from the other building as well as from the land.[1]

§ **89.** Where the circumstances are such that the right to support of one of two such buildings by the other does not exist, if one is being removed, the owner is bound to use due care to prevent damage to the other by the act of removal.[2]

§ **90.** One who has contributed to the subsidence of his own land by excavation of the subjacent or adjacent soil, or by burdening the soil with buildings, cannot claim a degree of support greater than he had before he did so.

Rights to Light.

NATURAL RIGHTS TO LIGHT.

§ **91.** A person has a natural right to receive vertically the light appertaining to the situation of his tenement.[3]

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[1] This right can be claimed under the Prescription Act. *Lemaitre* v. *Davis*, 19 Ch. D. 281; 51 L. J. Ch. 173.

See *Gately* v. *Martin*, (1900) 2 Ir. R. 269, in which it was held that it must be shown that the servient owner knew, or had the means of knowledge, that his house was affording support to the other.

[2] *Chadwick* v. *Trower*, 6 Bing. N. C. 1; 8 L. J. N. S. Exch. 286.

[3] *Corbett* v. *Hill*, L. R. 9 Eq. 671; 39 L. J. Ch. 547.

§ **92.** A person has no natural right to the light laterally appertaining to the situation of his tenement.[1]

Illustration.

A is owner of a house, some of the windows of which overlook a piece of ground belonging to B, a railway company, and used as a goods yard of B's railway station. A's house has been built 16 years, and A has enjoyed the light through its windows during that period. B now puts up a screen to obstruct the further enjoyment of the light by A. A cannot restrain B from doing so, because he has not acquired an easement of light.[2]

RIGHT OF EASEMENT TO LIGHT.

§ **93.** The easement of light consists in the right to require the servient owner to abstain from making, on his own tenement, any obstruction to the passage of light to the ancient windows, or other means through which light is communicated from the direction of the servient tenement to the dominant tenement.[3]

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[1] *I.e.*, he cannot rightfully prevent others from building near his property so as to obstruct or abridge the light so received.

[2] *Bonner* v. *Great Western Ry. Co.*, 24 Ch. D. 1; (App.) L. R. 27 Ch. D. 87.

[3] Such an easement arises by implied covenant to abstain from obstructing light.

Tapling v. *Jones*, 11 H. L. Ca. 290; 34 L. J. C. P. 342.

The implied covenant is *not* that there shall be an access of a *sufficient* amount of light *for ordinary purposes and no more*, but that there shall be no obstruction to the existing access of light.

§ **94.** Easements of light arise by express grant, by implied grant, or by prescription.

§ **95.** The construction of the rights to easements by express grant must depend on the terms of the grant.

RIGHTS OF EASEMENT IN LIGHT BY IMPLIED GRANT.

§ **96.** Easements of light by implied grant or implied reservation arise on severance of tenements in the same way as other easements, when the intention is implied of granting or reserving an easement together with the portion of the tenement which is the subject of the grant or reservation respectively.

Illustrations.

A sells B a house with windows overlooking A's grounds adjoining. A has impliedly granted to B an easement of light over his grounds to those windows;[1] because this is a con-

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This being so, *quære Corbett* v. *Jonas*, a case of implied grant arising out of a lease of a site, (1892) 62 L. J. Ch. 43.

[1] See *Bowry and Pope's Case*, quoted by Lord Blackburn in *Dalton* v. *Angus*, 6 App. Ca. 822, 823.

Coutts v. *Gorham*, Moo. & Mal. 396.

Palmer v. *Paul*, 2 L. J. Ch. 154.

White v. *Bass*, 7 H. & N. 722; 31 L. J. Exch. 283.

Phillips v. *Low*, (1892) 1 Ch. 47; 61 L. J. Ch. 44.

Myers v. *Catterson*, 43 Ch. D. 470; 59 L. J. R. Ch. 315.

Wilson v. *Queen's Club*, (1891) 3 Ch. 522; 60 L. J. Ch. 698.

tinuous and apparent easement, used during unity and required for the use of the tenement conveyed.

C sells one of two plots of land to A, and then the other to B. The conveyance to B was prior, but it was held that in equity A was the prior purchaser. B's plot had on it a house with windows overlooking A's plot. A obstructed B's windows, and B brought an action for an injunction to restrain A from doing so. But the sale to A being prior to that to B, B could not claim an easement of light by implied grant.[1]

In 1875, A conveyed land to B and C for the erection of a chapel. There was a covenant by the grantor that all the windows looking out on the land of A should be of fluted or ground glass. In February, 1878, the grantees commenced to build the chapel with windows overlooking the land reserved by A. A, in November, sold this land to D, who built so as to obstruct the windows of the chapel. Held, that A and his assigns were under an implied obligation not to obstruct the windows of the chapel.[2]

A, a testator, dies, leaving two sons, B and C. His trustees, in accordance with his will, executed two separate but contemporaneous conveyances, whereby they conveyed to B a piece of the testator's land with two dwelling-houses on it, and to C another adjoining piece of land with a warehouse at the further end of it. Each parcel was sold with all lights thereunto

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Allen v. *Taylor*, L. R. 16 Ch. D. 355, and the observations of Jessel, M. R., as to the law in *Palmer* v. *Fletcher*, 1 Lev. 122 (1675), being still the law governing such cases.

Godwin v. *Schweppes, Ltd.*, (1902) 1 Ch. 926; 71 L. J. Ch. 438, interprets sect. 6, sub-sect. 2 of the Conveyancing Act of 1881.

[1] *Beddington* v. *Atlee*, 35 Ch. D. 317; 56 L. J. R. Ch. 655.

See also *Birmingham, Dudley, & District Banking Co.* v. *Ross*, 38 Ch. D. 295; 57 L. J. R. Ch. 601, in which no grant of light was implied over the adjoining lands, as the plaintiff at the date of the sale had notice that it was intended to build on those lands.

[2] *Bailey* v. *Icke*, 64 L. T. 789.

belonging. C's successor in title was restrained from building on his land so as to obstruct his neighbour's lights.[1]

B, a builder (who had obtained from C a right to enter on certain land for the purpose of building several houses, which, as he built them, were to be leased to him for 99 years), built a house and obtained a lease. He then for value transferred his lease to A. Meantime he had commenced building another house, which eventually interfered with the access of light to A's house. A brought an action on the ground that B was derogating from his own grant. It was held on appeal that at the date of the transfer to A, B's only interest in the land was the right to enter to build, and that therefore, when he transferred the lease of the first house to A, there could have been no implied grant of light to A as appurtenant to the grant of the lease.[2]

§ 97. If, in respect of a tenement, light laterally received has been actually enjoyed for 20 years continuously[3] by the owner or lessee of the property, he acquires an easement to the light so received.[4]

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[1] *Allen* v. *Taylor*, 16 Ch. D. 355; 50 L. J. Ch. 178.

As to easements of light arising by implied reservation, *Russell* v. *Watts and others*, L. R. 10 App. Ca. 590; 55 L. J. Ch. 158, may be usefully consulted. The easement so reserved must, of course, be an easement of necessity. See *ante*, pp. 13 and 14.

[2] *Quicke* v. *Chapman*, (1903) 1 Ch. 659; 72 L. J. Ch. 373.

Pollard v. *Gare*, as to a right to light arising by implied covenant to a grantee of a lease as against a subsequent vendee from the same owner of building land, (1901) 1 Ch. 834; 70 L. J. Ch. 404.

[3] See §§ 28 and 35 as to what is not to be deemed an interruption within the Act.

[4] Under the Prescription Act.

It is not necessary that the person claiming, or in an action against him seeking to maintain the right, should show that the person desirous of abridging or obstructing it, or those through whom he claims, had knowledge of the access of light to the tenement during the period of user.[1]

§ **98.** The right to light by reason of length of enjoyment does not arise if there is an express written agreement upon which the right is made to depend, and by which the extent of the right is limited or regulated.[2]

§ **99.** The amount of light to which the right extends is measured by the amount hitherto passing, for the period required, by the ancient apertures.[3]

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[1] See § 34, *ante*.

[2] See under § 34, *Easton* v. *Isted*, there cited as to sect. 3 of the Prescription Act.

[3] Viz., the amount which has continuously had access to the ancient apertures.

By improvements in the windows without enlarging the apertures Turner received more of the light which all along had had access to the ancient apertures. This was held not to be an excessive enjoyment of his right.

Turner v. *Spooner*, 1 Dr. & Sm. 467; 30 L. J. Ch. 801.

The circumstance that the light passing, notwithstanding the obstruction, may be still sufficient to enable the owner of the dominant tenement to carry on his ordinary avocations; or that

§ **100.** A tenant of a house so built as to obstruct a right to light, having a mere limited interest in the house and not being entitled to remove the obstruction, is not answerable for continuing it.[1]

§ **101.** A tenant of land who builds so as to obstruct light, having himself directly caused the obstruction, is answerable for the injury.[1]

Extent of User of Easements.

§ **102.** If a grant is wholly at variance with an Act of Parliament it is void. If only partly so it is good so far as it is not opposed to the Act.

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though the light is obstructed in a certain degree in one direction, more light than formerly reaches the tenement in another direction, does not justify the obstruction of a right to light.

Yates v. *Jack*, L. R. 1 Ch. App. 295; 35 L. J. Ch. 539.

Dyers' Co. v. *King*, L. R. 9 Eq. 438; 39 L. J. Ch. 339.

Warren v. *Brown*, (1902) 1 K. B. 15; 71 L. J. K. B. 12, in which the statement of the law by Mellish, L. J., in *Kelk* v. *Pearson*, L. R. 6 Ch. 809, 814, was approved and applied.

Mellish, L. J., observed: "I cannot think it is possible for the law to say that there is a certain quantity of light that a man is entitled to, and which is sufficient for him, and that the question is whether he has been deprived of that quantity of light."

[1] *Arnold* v. *Jefferson*, Holt, 498.

As to the acquisition of easements of light by prescription, see *ante*, §§ 15 to 42.

Illustration.

A, a corporation, is empowered by Act of Parliament to make a water-course for certain purposes. After making the water-course it grants away a certain portion of the water for other purposes. The grant may be good to the extent of the water remaining available after fulfilment of the purposes for which the corporation was formed by the Act.[1]

§ 103. If a right of easement has been granted by deed the extent of the right is determined by the construction of the deed.

Illustrations.

A leases to B, granting B rights of drainage through A's adjoining property, but stipulates against the enlargement of the buildings without A's permission. B purchases the reversion, and the conveyance contains a similar right of drainage to that contained in the lease. B subsequently enlarges his buildings. The right of drainage having had reference to the house in the state in which it was before the enlargement cannot be extended so as to embrace the whole of the drainage of the enlarged structure.[2]

A, the owner of some land, granted a part of it to B, with a house upon the portion granted. It was contemplated by the parties that the house would be used for business purposes. B takes the house with a right as against A to light sufficient for all ordinary purposes of business in the locality, but not such

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[1] *Attorney-General* v. *The Corporation of Plymouth*, 9 Beav. 67; 15 L. J. Ch. 109.

[2] *Wood* v. *Saunders*, L. R. 10 Ch. 582; 44 L. J. Ch. 514.
See also *Finlinson* v. *Porter*, L. R. 10 Q. B. 188; 44 L. J. Q. B. 56.
United Land Co. v. *Great Eastern Ry. Co.*, L. R. 10 Ch. 587; 44 L. J. Ch. 685.
Collins v. *Slade*, 23 W. R. 190, V.-C. B.

as may be requisite for a special purpose not shown to have been contemplated.[1]

§ **104.** If an easement is granted for general purposes it cannot be restricted to particular purposes, so long as the purposes for which it is used do not impose a greater burden on the servient tenement than what was contemplated at the time of the grant.

§ **105.** When a dominant owner possessing an easement in respect of his tenement severs that tenement, reserving a portion for himself and selling a portion to a person, or several divided portions to several persons, the vendee, or vendees, severally take, with their several purchases of the severed portion or portions of the tenement, rights in the easement measured respectively by the extent to which it has hitherto been enjoyed with the respective portions of the tenement: provided that such distribution among the vendor and the several vendees does not impose any greater burden on the servient tenement than that which may have been granted, or may be presumed to have been granted.[2]

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[1] *Corbett* v. *Jonas*, (1892) 3 Ch. 137; 62 L. J. Ch. 43. See, however, note in reference to this case on § 93, *ante*.

[2] *Codling* v. *Johnson*, 9 B. & C. 933; 8 L. J. K. B. 68. *Bower* v. *Hill*, 2 Bing. N. C. 339; 5 L. J. N. S. C. P. 77. And see § 71.

Illustrations.

(*a.*) A has a large building with a right of way by easement (not being a way of necessity) appurtenant to it over B's land. A parcels his building out into 100 portions and, reserving one to himself, sells the rest severally to 99 persons.

The right of way is not conveyed to the 99 vendees, because to permit this would be to permit a hundred people to pass by the way in place of one, which must necessarily increase the inconvenience to the servient tenement and impose on it a greater burden than may be presumed to have been granted.

(*b.*) In the same case A has an easement of light over B's ground. The right is a right to have the light pass unobstructed from the ground of B to 100 front windows in A's house. On sale of 99 portions of the house by A to 99 vendees, each portion containing a front window, a right to light to the windows of his purchased portion passes to each vendee, because this does not impose on the tenement of B any greater burden than before existed.

§ **106.** In respect of a right of way a servient owner is bound not to contract unreasonably the width of the road or render the exercise of the right of passing less easy than it was at the time of the grant.[1]

§ **107.** The dominant owner is under an obligation not to enlarge the use exercised under his right.[2]

§ **108.** If a right has been acquired by prescription, the extent of it must be determined by the accustomed user.

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[1] *Hawkins* v. *Carbines*, 27 L. J. Exch. 44.

[2] See § 51.

§ **109.** The accustomed user is measured by the extent of the user at the commencement of the period of user which having been continuously enjoyed gives, when completed, a prescriptive right.[1]

Illustrations.

(*a.*) A transmits dirty water to the premises of B. He has acquired a right by user of 20 years' duration to transmit clear water. The extent of his right is to transmit clear water.

(*b.*) A has acquired a right to transmit water in a certain degree of pollution to B's premises. He may not send water of a higher degree of pollution than he has acquired a right to send.

(*c.*) A, having previously acquired a right to foul a stream, set up new factories in the place of those to which the right was attached, and thus materially increased the degree to which the water was fouled. The subsequent increase in the fouling of the water might, if it were continued long enough, give rise to a new prescriptive right to foul it to that extent, but the right previously acquired is not thereby extended.[2]

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[1] *United Land Co.* v. *Great Eastern Ry. Co.*, L. R. 10 Ch. 587; 44 L. J. Ch. 685.
Wimbledon and Putney Commons' Conservators v. *Dixon*, 1 Ch. D. 362; 45 L. J. Ch. 353.
Bradburn v. *Morris*, 3 Ch. D. 812, C. A.
Crossley v. *Lightowler*, L. R. 2 Ch. Ap. 478; 36 L. J. Ch. 584.
See also § 62. Thus the measure of the degree to which the right to pollute a stream is acquired is the degree of pollution arising from the user as it existed at the commencement of the period of prescription. A subsequent enlargement of the user had at the commencement of the period does not avail to enlarge the right.

[2] *Crossley* v. *Lightowler*, L. R. 2 Ch. Ap. 478; 36 L. J. Ch. 584.

§ **110.** If, from the extent of user having been gradually and imperceptibly increasing, it is impossible to measure definitely the extent of the user at the period of its commencement, no easement can be acquired.[1]

§ **111.** An easement of light is not considered to be altered in the extent of its use, so long as the alteration to the windows or other aperture through which light is received involves no extension of the boundaries of the aperture, but is solely confined to improved modes of transmitting the light by alterations within the boundaries of the aperture.[2]

Illustrations.

(*a.*) A had two ancient windows made with small casements in leaden lattices, which only opened partially. He removed the casements and inserted plate glass in light frames, and made the windows open wide.

This is not an excessive exercise of the easement.[2]

(*b.*) A sells B a house with windows overlooking A's grounds. A has impliedly granted an easement of light over his grounds to those windows. B, after purchase, materially alters the windows by enlargement, and also opens new windows.

Here the extent of the use is altered.

A may build so as to obstruct the light to the new windows, and may also build so as to obstruct the light to the enlargements of the old windows, if he can do so without obstructing

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[1] *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. Ap. 349; 35 L. J. Ch. 382.

[2] *Turner* v. *Spooner*, 1 Dr. & Sm. 467; 30 L. J. Ch. 801. See *supra*, p. 79, n.

the light which B is entitled to receive through the former extent of the enlarged windows.[1]

§ **112.** A servient owner has a right to obstruct the enjoyment of an easement where that enjoyment is in excess of the right of the owner of the dominant tenement. He may obstruct it to the extent which is necessary to enable him effectually to prevent the excessive enjoyment, but no further.

Illustration.

A has a right of easement to send clean water through B's drain. He sends dirty water. Here B cannot obstruct the enjoyment by A of his easement in excess of his rights without stopping the water entirely. He is therefore entitled to do so.

Explanation.—By excessive enjoyment is meant enjoyment which imposes or tends to

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[1] *Blanchard* v. *Bridges*, 4 A. & E. 176; 5 L. J. N. S. K. B. 78. *Chandler* v. *Thompson*, 4 Campb. 80.

Tapling v. *Jones*, 11 H. L. C. 290; 34 L. J. C. P. 342, in which it was laid down that the right to obstruct light possessed by an owner of a servient tenement is simply his right of building on his own land, and the opening of new windows by the owner of the dominant tenement neither confers nor enlarges such right.

The case of *Fowlers* v. *Walker*, 51 L. J. Ch. 443, C. A. (affirming 49 L. J. Ch. 598), is not in conflict with *Tapling* v. *Jones*, as in the former case (in which the facts were that three old cottages with some small windows had been pulled down, and a large warehouse with three large windows had been built on their site) reliable evidence was wanting as to the position of the windows in the cottages, and the extent of the easement of light could not be established.

impose a greater burden upon the servient tenement than is authorized by the express or implied grant.

Illustration.

A has by 20 years' enjoyment acquired an easement to the use of light to his tenement through several ancient windows. The light passes over the open land of B, and B has been hitherto bound not to build so as to obstruct the light passing to the windows. A afterwards enlarges his windows. Here A does not by this act impose any further burden upon the servient tenement of B, because the enlargements do not at present lay B under any increased obligation to abstain from building. But by 20 years' enjoyment of the access of light through the enlargements of the windows, A would acquire the right to prevent B from building so as to shut out the light from the enlargements. This act, therefore, *tends* to impose on B a greater burden than before, and results in an excessive enjoyment of the easement. And B, exercising the right he already has of building on his own land, may build so as to obstruct the enlargements; but if he does so, he must avoid obstructing the ancient lights.[1]

§ **113.** A servient owner can only obstruct the right of easement on his own ground.

§ **114.** If it is impossible to obstruct the excessive exercise of the right without going on to the premises of the dominant owner, the servient owner must obtain redress by legal proceedings.

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[1] *Blanchard* v. *Bridges*, *Chandler* v. *Thompson*, *Tapling* v. *Jones*, as cited in p. 86, *suprà*.

Of the Incidents of Easements.

§ 115. In the absence of express stipulation in the instrument, if any, creating the easement, no obligation to repair that by which the enjoyment of the easement is held lies on the servient tenement.

Illustrations.

The owner of the highway (Stockport and Hyde Highway Board) has acquired a right of support to the highway by a wall belonging to B. If the wall is out of repair B is not bound to repair it. The owner of the highway is.[1]

A, having an easement of private way, has no right to leave it and take another on account of the want of repair. He has a right to repair it himself, but there is no obligation on the owner of the servient tenement to repair it.[2]

§ 116. If the enjoyment of the easement is had by means of artificial works, the owner of the dominant tenement is liable for damage to the servient tenement arising from their non-repair.

§ 117. When the easement is independent of artificial works, and the injury to the servient

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[1] *Stockport and Hyde Highway Board* v. *Grant*, 51 L. J. Q. B. 357; 46 L. T. 388.

[2] Blackstone mistakenly lays it down that the owner of the dominant tenement having a right of private way may abandon it for want of repair and take another.

tenement arises from natural causes only, no such liability accrues.

§ **118**. In what is necessary for the enjoyment of the easement the owner of the dominant tenement may do everything that is required for the full and free exercise of his right.

Illustration.

A has a right to an uninterrupted flow of water through the land of B by means of pipes. This right carries with it the right to enter upon B's land for the purpose of cleaning and repairing and otherwise preserving the pipes.[1]

Of the Extinguishment of Easements.

§ **119.** Easements are liable to be extinguished by the provisions of an Act of Parliament.[2]

Illustration.

In 1867, A erected buildings on his property. In 1888, B, the lessee of land opposite A's building, whose landlord was the local authority, erected buildings which obstructed the light

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[1] *Goodhart* v. *Hyett*, L. R. 25 Ch. D. 182; 53 L. J. N. S. Ch. 219.

[2] Sect. 20 of the Artizans' Dwellings Act, 1875, provides that on the purchase of lands by a local authority for the purposes of the Act all rights of way and all other rights or easements in or relating to such lands shall be extinguished; compensation being given to persons who have sustained loss by the operation of the provisions of this section.

which A's windows had received since 1867. The land had been purchased by the local authority under the Artizans' Dwellings Act, and A could not maintain an action for damages for the obstruction, but was entitled to compensation. The easement he had acquired was extinguished.[1]

§ 120. Easements may be lost—

by express renunciation, or where the grant was for a particular purpose, by cessation of the purpose;

by the merger of the two tenements by union in one owner;

by cessation of the necessity in easements of necessity;

by abandonment through non-user;

by the license of the dominant owner.

§ 121. A private right of way is not extinguished by the acquisition by the public of a public right of way over the same ground.[2]

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[1] *Barlow* v. *Ross*, (App.) 24 Q. B. D. 381;
59 L. J. Rep. Q. B. 183.

[2] But it may be a question, in every case of the kind, whether the dominant owner has not abandoned his private right of way.
Regina v. *Chorley*, 12 Q. B. 515, and see § 78.

The question whether, in such a case, the private right of way still exists or not, is of importance only in regard to the remedies for injury to the right.

An action will not lie by an individual for damages for injury to him in his right, as one of the public, to use a public right of way, *unless he has sustained special damage.*

Illustration.

A has already acquired a private right of way. A public right of way is afterwards acquired over the same ground. The private right is not extinguished.

EXTINGUISHMENT BY EXPRESS RELEASE.

§ **122.** Extinguishment by express release must be by an instrument under seal. Acts of Parliament by which easements are destroyed have the operation of express releases.[1]

EXTINGUISHMENT BY MERGER.

§ **123.** By union of the two tenements in one owner, the special kind of property which an easement is, becomes merged in the general rights of property.

Illustrations.

(*a.*) B has an easement of right of way (not being a way of necessity) over the tenement of A, which adjoins B's tenement. B purchases A's tenement, and then immediately sells it to C. The right of way which B possesses over the adjoining tenement becomes merged by the purchase by B of A's tenement, and unless B, in selling to C, reserves the right of way, he can no longer claim to exercise it.[2]

(*b.*) B has an easement of right of way (not being a way of

The ordinary remedy is by indictment; whereas an action lies by anyone injured in his right to use a *private* right of way, without any special damage.

[1] As, for instance, the General Inclosure Act, 41 Geo. III. c. 109, s. 8.

[2] See § 14 and note 2, p. 12.

necessity) over the tenement of A, which adjoins B's tenement. A purchases B's tenement, and then immediately sells it to C. Here the right of way, having been merged in the general rights of property, cannot be claimed by C unless expressly granted.

(*c.*) B has an easement of right of way (not being a way of necessity) over the tenement of A, which adjoins B's tenement. B purchases A's tenement, and then immediately sells his own tenement to C. C, for the same reason as in illustrations (*a.*) and (*b.*), cannot claim the right of way. If, however, any interval elapsed between the merger and sale in (*a.*), (*b.*), and (*c.*), during which the convenience of the way between the two tenements had been used and enjoyed therewith, section 6 of the Conveyancing Act of 1881 might operate to pass the convenience as an easement without express grant or reservation.[1]

§ **124.** Easements do not become and continue dormant or latent when two tenements are so united; nor are they *revived* on the subsequent severance of the tenement; but in the case of easements of necessity and other easements, of which a grant will be implied on severance of tenements, they arise newly with and consequent upon the severance.

Illustration.

In the illustrations (*a.*), (*b.*), and (*c.*) to § 123, if the way is a way of necessity, the easement becomes merged by the purchase, but arises again on severance of the tenements by the sale to C.

§ **125.** Rights attaching to a tenement by reason of its situation, generally termed "NATURAL RIGHTS," are never extinguished.

If obstructed for a time by the possession of

[1] See § 14.

an easement by some person other than the possessor of the natural right, they are suspended, and are revived on extinction of the easement, either by unity of possession or otherwise.

Natural rights in actual exercise are not merged or lost by unity of possession of the two tenements in right of which the natural right is exercised.

Illustrations.

(*a.*) A, a riparian proprietor, dams up a stream and acquires an easement to obstruct the flow of water to B's tenement on the bank of the stream. Afterwards A buys B's tenement and thus extinguishes the easement. He then sells B's tenement to C. C has a natural right, or a right by vicinage, to the unobstructed flow of water.

(*b.*) A had a natural right to the flow of water of a stream on which B, higher up, but adjoining A's tenement, was also a riparian proprietor. A purchased B's tenement and then sold it to C. A, by the union of the two tenements, did not lose his natural right to the unobstructed flow of water.[1]

(*c.*) Two closes, *x* and *y*, adjoin. The owner of *x* is, by prescription, bound to fence his close. The owner of *y* purchases *x*. The obligation to fence is thus extinguished. He dies leaving two daughters, to whom the property goes. They make a partition, the one taking the one close, the other, the other. The obligation to fence is not revived, because the right to have a neighbouring close fenced off is not a natural right, but an easement.[2]

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[1] *Sury* v. *Pigott*, Popham's Reports, 166.
(See also in Tudor's L. C. on the Law of Real Property.)

[2] Dictum in *Sury* v. *Pigott* approved in *Wood* v. *Waud*, 3 Exch. 748; 18 L. J. Exch. 305.

Exception.—Easements are not merged by union of the two tenements in one owner, if the two tenements are estates which are not co-extensive.[1] But the right of easement is in such case suspended.[2]

EXTINGUISHMENT BY CESSATION OF PURPOSE.

§ **126.** If an easement has been granted for a particular purpose, or has arisen out of the enjoyment of a right for a purpose which no longer exists, the easement ceases.

Illustration.

A canal company formed by Act of Parliament has a right to a water-course granted to it by another company for the supply of the canal. Afterwards the canal company is reconstituted by Act of Parliament as a railway company, and they then sell to A their canal property, including their water right. The canal company having ceased to exist, their water right has also ceased, and A cannot claim to exercise it.[3]

EXTINGUISHMENT BY CESSATION OF NECESSITY.

§ **127.** Easements of necessity cease when the necessity itself ceases.

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[1] As a tenement in fee and one for life.

[2] *James* v. *Plant*, 4 A. & E. 749; 6 L. J. N. S. Ex. Ch. 260.

[3] *National Guaranteed Manure Co.* v. *Donald*, 4 H. & N. 8; 28 L. J. Exch. 185.

Illustration.

A has a way of necessity over C's close. Subsequently A purchases adjoining property through which he has access to his own close.

A's way of necessity over C's close ceases.[1]

EXTINGUISHMENT BY ALTERATION OF MODE OF ENJOYMENT.

§ **128.** Except in the case of easements of light acquired by prescription, if the owner of the dominant tenement alters, substantially, the character of the enjoyment with reference to which the easement was expressly or impliedly granted, the easement is extinguished.

Whether the alteration is a substantial alteration or not is a question of fact to be determined on the circumstances of the particular case.

Illustrations.

(*a.*) A right of way is granted for the purpose of being used as a way to a cottage.

The cottage is changed into a tanyard. The right of way ceases.[2]

(*b.*) A has a right that the water of his roof shall drop from the eaves of his house into his neighbour's yard. He raises the height of his house so that the drops have a greater distance to

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[1] *Holmes* v. *Goring*, 2 Bing. 76; 2 L. J. C. P. 134.

[2] Illustration given by Baron Parke in *Henning* v. *Burnet*, 8 Exch. 187; 22 L. J. Exch. 79.

fall. It is a question of fact whether this, in the particular circumstance, is a substantial alteration.

§ **129.** Extinguishment takes place even though the burden imposed on the servient tenement is by the alteration in the mode of user rendered less than before.

Illustration.

A had an easement of polluting water with the refuse of a fellmongery, by enjoyment from 1832 to 1877. In 1878, the fellmongery was abandoned, and a different manufacture, that of leather boards, substituted, the refuse of which polluted the water less. It was held in a proceeding before the Drainage Commissioners, and the decision was affirmed in appeal to Quarter Sessions, that if A had acquired a right to pollute the river, it was as a fellmonger, and not as a leather board manufacturer, and that he could no longer claim the right to pollute the water, even though the present pollution was less burdensome than that of the fellmongery.[1]

A mere diminution in the *burden* imposed by the original mode of user, such as had been enjoyed from the starting point for prescription, without any alteration in the *mode* of user itself, will not entail this effect.[2]

Alteration in the mode of enjoyment does not, in the case of easements of light acquired

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[1] *Clarke* v. *Somersetshire Drainage Commissioners*, 57 L. J. M. C. 96.

[2] But the right to the disused portion of the extent of user would be liable to be lost by lapse of time. See as to this *James* v. *Stevenson*, 1 R. 324; (1893) A. C. 162; 62 L. J. P. C. 51.

by prescription, work an extinguishment of the easement, even when such alteration may eventually by continued enjoyment become prejudicial to the servient owner.[1]

Illustrations.

A has three cottages containing ancient lights. He pulls them down, and erects a large warehouse with large windows. In afterwards suing for a remedy against the servient owners for building so as to block the light coming to his ancient windows, he is unable to offer trustworthy evidence as to the exact position of the ancient windows with reference to the new windows, and cannot maintain his easement as to the new building.[2] Here there was no *extinguishment* of the easement, though the alteration had rendered it impossible to prove the extent of it.

A had ancient lights in some old buildings which he pulled down in 1872. He re-erected the building with a greater number of windows, some of them of a larger size than before. Portions of the new windows were in positions corresponding with portions of the old windows. The right was not extinguished, and A obtained an injunction against the obstruction by B of the light passing to the portions of the new windows which corresponded with the old.[3]

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[1] See *Tapling* v. *Jones*, 11 H. L. C. 290; 34 L. J. C. P. 342.

[2] *Fowlers* v. *Walker*, 51 L. J. Ch. 443, C. A., affirming 49 L. J. Ch. 598. See also *Pendarves* v. *Monro*, (1892) 1 Ch. 611; 61 L. J. Ch. 494.

[3] *Scott* v. *Pape*, 54 L. J. Ch. 914; affirmed in App., 31 Ch. D. 554; 55 L. J. Ch. 426. But see *Pendarves* v. *Monro*, *suprà*. To establish such a claim it must be shown that some particular part of the new apertures corresponds substantially with some particular part of the old apertures. (1892) 1 Ch. 611; 61 L. J. Ch. 494.

EXTINGUISHMENT BY NECESSARY CONSEQUENCE OF ACT BY DOMINANT OWNER.

§ **130.** When the dominant owner authorizes an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is to prevent his future enjoyment of the easement, and the permission is acted upon, the easement is thereby extinguished.[1]

EXTINGUISHMENT BY ABANDONMENT.

§ **131.** Easements may be extinguished by abandonment. Whether an easement has been abandoned or not must be determined from the circumstances of the case.

Illustration.

Buildings enjoying light were pulled down in 1891, and on the site of them other buildings were erected with apertures for light occupying the position of those in the former buildings. Parts of these apertures were boarded up, and in other parts shelves which materially interfered with the light were placed for drying printing work. Light, however, passed into the building in ample quantity. The owners of these buildings moved for an injunction to restrain the defendants from interfering with their ancient lights, and one of the questions was whether the right to ancient lights had not been lost in the rebuilding of the premises, and blocking up parts of the windows. It was held that though the boarding and shelving constituted

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[1] *Liggins* v. *Inge*, 7 Bing. 682; 9 L. J. C. P. 202. See Illustration (*a.*) to *Exception* (1), § 162.

a discontinuance *pro tanto* of the user, there had been no abandonment of the right.[1]

A had some ancient windows. He pulled down the wall in which they were and built it up blank. It continued thus for 17 years. Then B built up a wall opposite to it, and after three years A opened a window in his wall, and brought an action against B for obstructing his light.

The alteration made by A in pulling down his wall and building it up blank was of such a character that it was open to the Court to determine that he had abandoned his right of easement.[2]

§ **132.** The rule as to extinction of easements of light by abandonment is the same as in the case of easements which consist of a right to require the servient owner to submit to the dominant owner doing an act on the servient tenement, viz., that the easement is extinguished on the cesser of use, coupled with any act clearly indicative of an intention to abandon the right.[3]

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[1] *Smith* v. *Baxter*, (1900) 2 Ch. 138; 69 L. J. Ch. 437.

[2] *Moore* v. *Rawson*, 3 B. & C. 332.

Greater difficulties may arise in the case of what may be called easements of abstention (generally called negative easements), in determining whether abandonment has taken place; but it is in all cases simply a question on the facts whether the right has been abandoned.

[3] See Illustration to § 131.

As already observed at § 93, p. 71, the easement of light consists in the right to require the servient owner to abstain from making, on his own tenement, any obstruction to the passage of light to the ancient windows or other means by

§ **133.** If a person having an easement of light does any act which induces the owner of the servient tenement to entertain a reasonable belief that he has abandoned his easement of light, and the owner of the servient tenement in consequence incurs expense in building in such a manner as tends to obstruct the passage of light to the dominant tenement, the owner of the dominant tenement is estopped from saying that he has not abandoned his easement, unless he is willing to make a fair compensation to the owner of the servient tenement for the expense incurred.

Illustration.

A has a warehouse with ancient windows guarded by iron bars. He blocks up the windows with rubble and plaster, but leaves the bars outside.

The windows are so left for 19 years. The owner, B, of the servient tenement then builds so as to obstruct the passage of light to the dominant tenement. Even though A is not found to have intended to abandon his right to light, yet if his act has been such as to induce in B a reasonable belief that he had done so, and has led B to incur expense, he is estopped from saying that he had not abandoned his right, unless he compensates B for the expense incurred.[1]

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which light is communicated from the direction of the servient tenement to the dominant tenement. Such an easement arises by implied covenant to abstain from obstructing light.

[1] *Stokoe* v. *Singers*, 8 E. & B. 31; 26 L. J. Q. B. 257.

§ **134.** In the case of discontinuous or intermittent easements, if there is direct evidence of an intention to abandon the right, it may be shown to be abandoned after any the *shortest* period of non-user.

§ **135.** If the evidence is of an indirect character, non-user for twenty years is requisite to prove abandonment.[1]

See as to this rule of estoppel, *Cornish* v. *Abington*, which is in advance of *Pickard* v. *Sears*, inasmuch as the rule in the latter case required that the party estopped should be found to have *intended to make the other party believe and act on the belief.* In *Cornish* v. *Abington*, 4 Hurl. & N. 549; 28 L. J. Exch. 262, it was held to be sufficient to show that the party estopped had, by his *negligent conduct*, though without intention, deceived the other into a belief on which he acted so as to change his situation.

[1] *Doe* v. *Hilder*, 2 B. & A. 791.
Moore v. *Rawson*, 3 B. & C. 332.
Holmes v. *Buckley*, 1 Eq. Cas. Abr. 27.
Payne v. *Shedden*, 1 Moo. & Rob. 382.
The Queen v. *Chorley*, 12 Q. B. 515.
Ward v. *Ward*, 7 Exch. 838; 21 L. J. Exch. 334.
Lovell v. *Smith*, 3 C. B. N. S. 120.
Hall v. *Swift*, 6 Scott, 167; 4 Bing. N. C. 381; 7 L. J. N. S. C. P. 209.
Norbury v. *Meade and others*, 3 Bligh, 241.
Young v. *Star Omnibus Co.*, in which plaintiffs were shown to have erected a summer-house projecting to some extent over the strip of land along which they claimed a right of way, and were held not to have abandoned their right in so doing. (1902) 86 L. T. 41.

EXTINGUISHMENT BY LICENCE.

§ **136.** An easement may also be extinguished by the licence of the owner of the dominant tenement.[1]

OF THE DISTURBANCE OF RIGHTS ARISING BY SITUATION AND OF RIGHTS OF EASEMENT.

§ **137.** The rights to transmit
impure air,
impure water,
disagreeable noises, or vibrations
into the neighbouring property are rights which can only be acquired by grant, express or implied, or by prescription, and are therefore easements if appurtenant to a tenement and existing for the convenience of that tenement, and in other respects satisfying the conditions of an easement.

§ **138.** No easement can be acquired by prescription, either at Common Law or under

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[1] *Liggins* v. *Inge.* See § 162, *Exception* 1, and Illustration (*a*2). And see *James* v. *Stevenson*, 1 R. 324; (1893) A. C. 162; 62 L. J. P. C. 51, where there was a right of access to a way over the grantor's property "from any point," and some, though insufficient, evidence of abandonment of the right to this large extent, and confinement of it to a particular point of access.

the Prescription Act, of any user of such disturbance of rights which may be neither susceptible of interruption nor actionable.[1]

Illustration.

In 1873, A, a medical man, built a consulting room on a portion of his premises adjoining the premises of a confectioner, B, who by the use of machinery in his business transmitted noise and vibration into the premises of A. A brought an action in 1879 against B for an injunction on account of the disturbance. The noise could not in its nature have been interrupted, and the annoyance, though it had been carried on for 20 years prior to 1873, did not become actionable until A built his consulting room. B had not acquired an easement to transmit the noise.[1]

§ **139.** Acts in assertion of such rights are in their inception invasions of the natural rights of property arising out of situation, and are termed nuisances, if they interfere sensibly with the ordinary comfort of human existence.

Illustration.

A, engaged in the sale of lace, settles in the neighbourhood of a brewery which has been carried on for 10 years. A's goods become damaged by the atmosphere of the brewery. A's natural right to purity of air has been invaded.[2]

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[1] *Sturges* v. *Bridgman*, (App.) 11 Ch. D. 853; 48 L. J. R. Ch. 785.

[2] *Robins* v. *A brewer*, Vin. Abr. Nusans. (Mc.).
Elliotson v. *Feetham and another*, 2 Bing. N. C. 134.
Bliss v. *Hall*, 4 Bing. N. C. 183; 7 L. J. N. S. C. P. 122.

§ **140.** To erect or place,[1] or continue[2] anything offensive so near the property of another as to render it useless for its purpose and, if a house, unfit for habitation, or in any other way to obstruct the exercise of a natural right arising by situation, or of a right of easement, is a nuisance and actionable.[3]

§ **141.** In every instance it is a question of fact whether such a degree of annoyance exists as can be said to interfere sensibly with the ordinary comfort of human existence.

§ **142.** No suitability of place can legalise a nuisance.*

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[1] In *Jones* v. *Powel* (Hutton, 136), a case is cited of an action brought against a dyer *Quia fumos, fœditates, et alia sordida juxta parietes querentis posuit, per quod parietes putridæ devenerunt, et ob metum infectionis per horridum vaporem, &c., ibidem morari non audebat.* And see *Ballard* v. *Tomlinson*, (App.) 54 L. J. Ch. 454; 29 Ch. D. 115, where the defendant turned sewage into his well, which by percolation polluted the water in an adjoining well belonging to plaintiff.

[2] *Penruddock's Case*, 5 Rep. 100 b.
Some v. *Barwish*, Cro. Jac. 231.
Saxby v. *The Manchester, Sheffield, & Lincolnshire Ry. Co.*, L. R. 4 C. P. 198; 38 L. J. C. P. 153.
See especially the judgment of Keating, J.

[3] See *Wright* v. *Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94; & *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148.

* In Comyns' Digest, "Action for Nuisance," it is said "an action doth not lie for the reasonable use of my *right*, "though it be to the annoyance of another; as if a butcher,

§ **143.** A nuisance is not justified by the existence of other nuisances of a similar character, if it can be shown that the inconvenience is increased by the nuisance for which redress is sought.[1]

§ **144.** An obstruction or disturbance of an easement is conduct which deprives or tends to deprive the possessor of the right of the enjoyment of it.

Illustration.

A has an easement over B's ground of having water carried in pipes to A's adjoining tenement. B builds over the pipes and prevents A having access to them to repair them when out of

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" brewer, &c., use his trade in a convenient place, though it be " to the annoyance of his neighbour."

No authority is cited for this proposition. *Vide* judgment of Martin, B., in *Stockport Waterworks Co.* v. *Potter*, 31 L. J. Exch. 9. In *Hole* v. *Barlow*, 4 C. B. N. S. 334, the questions left to the jury were, was the place where the bricks were burnt a proper and convenient place for the purpose? and if not, was the nuisance such as to make the enjoyment of life and property uncomfortable? and the jury found for the defendant; in effect finding (as Baron Martin subsequently said) that there had been no nuisance. But the doctrine of " a proper and convenient place " was overruled in *Bamford* v. *Turnley*, *q. v. infrà*.

Bliss v. *Hall*, 4 Bing. N. C. 183; 7 L. J. N. S. C. P. 122.
Elliotson v. *Feetham*, 2 Bing. N. C. 134.
Walter v. *Self*, 4 De G. & S. 315; 20 L. J. Ch. 433.
Soltau v. *De Held*, 2 Simons, N. S. 133.
Bamford v. *Turnley*, 3 B. & S. 66;
31 L. J. Q. B. Exch. Ch. 286.

[1] *Crossley* v. *Lightowler*, L. R. 2 Ch. A. 478; 36 L. J. Ch. 584.

order. B has disturbed and obstructed A in the enjoyment of his easement.[1]

§ **145.** An obstruction or disturbance of a right arising by situation or of a right of easement is actionable without its being necessary to show special damage.

§ **146.** An obstruction or disturbance includes a continuance of an obstruction or disturbance.[2]

§ **147.** It is immaterial whether the person whose right, arising by situation, has been disturbed has as yet made use of that to which the right so disturbed extends.

Illustration.

A, having just occupied land on the bank of a stream, has a natural right to the use of the water of the stream. B, higher up, has also a natural right to the use of it. B uses it so immoderately that A is not able to exercise his right to the extent of a reasonable use of it. Here, whether A had or had not to any extent appropriated the water before the disturbance of his right by B, the act of B is an injury to A's right, and is actionable without special damage to A being shown.[3]

A person may enter the land of another, after request made and permission to enter refused, in order to abate a nuisance created or permitted by that other, or by the demisor of that

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[1] *Goodhart* v. *Hyett*, 25 Ch. D. 182; 53 L. J. Ch. 219.

[2] But see § 100 as to tenants.

[3] *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148.

other, whether the nuisance consist in obstruction of a natural right or of an easement.[1]

Illustration.

A has right of way along a path leading from *a* to *b*:—

a.....*c*.....*b*

B builds a house upon the way at *c*. A, after notice and request to B to remove it, may enter upon it and pull it down, whether it is occupied or not.[2]

If the nuisance created by the other is in a person's own land and may be abated without going into the other's land, it may be so abated without asking permission or giving notice.[3]

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[1] *Penruddock's Case*, 5 Coke's Rep. 100 b.
Perry v. *Fitzhowe*, 8 Q. B. 757.
Battishill v. *Reed*, 18 C. B. 697.
Davies v. *Williams*, 16 Q. B. 546.
Lane v. *Capsey*, 3 Ch. 411; 61 L. J. Ch. 55.
In *Perry* v. *Fitzhowe*, in the statement of the rule, the circumstances in which a breach of the peace was liable to occur formed an exception to the right to enter for the purpose of abating the nuisance; and this was followed in *Battishill* v. *Reed*. But looking to *Davies* v. *Williams* and *Lane* v. *Capsey* (the case in the illustration), it would appear that there is no such exception recognized. A man may, in such cases, take the law into his own hands.

[2] *Lane* v. *Capsey*, *v. suprà*.

[3] See *Lemmon* v. *Webb*, a case in which plaintiff's trees overhung and obstructed the entrance to defendant's farmyard. Defendant cut the trees without notice, and without going on plaintiff's premises, 63 L. J. Ch. 570.

§ **148.** Disturbances of easements may injuriously affect

1. The occupier.
2. The reversioner.

It is only in cases in which the *estate* is prejudicially affected by the disturbance that the reversioner is regarded as having sustained an actionable injury.[1]

Illustrations.

A is the owner of land and a tenement in the occupation of B as lessee. During the term of the lease C obstructs the ancient lights of the tenement. B, as the lessee, has his action. As the reversionary interest in the house is diminished by C's act, A, the reversioner, also has his action.

A is the owner of land in the occupation of B as lessee. During the term of the lease C enters the land for the purpose of asserting a right of way. For this B has his action. Such an act during the tenancy does not constitute evidence against the reversioner, A, on the question of the right of way. The reversioner, therefore, is not prejudiced by it in his estate, and can have no right of action.[1]

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[1] *Jesser* v. *Gifford*, 4 Burr. 2141.
Simpson v. *Savage*, 1 C. B. N. S. 347; 26 L. J. C. P. 50.
Metropolitan Association v. *Petch*, 5 C. B. N. S. 504; 27 L. J. C. P. 330.
Kidgill v. *Moor*, 9 C. B. 364; 19 L. J. C. P. 177.
Cooper v. *Crabtree*, 20 Ch. D. 589; 51 L. J. Ch. 544 (no injury affecting the reversion).

OF CAPACITY.

OF THE CAPACITY TO ACQUIRE AN EASEMENT.

Express Grants.

§ **149.** No person can take a grant without his consent, express or implied.

The grantee may signify his dissent when free from his disability, and, provided the grant was disadvantageous to him, may avoid it.[1]

A grant to an *infant* grantee, if he die during minority without having agreed to the grant, or die after he is of age without having assented to it, and his heir will not accept it, is avoided.

Lunatics.—A grant to a person apparently of unsound mind will be upheld if fair and *bonâ fide* where the transaction is fully completed.[2]

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[1] A grant is presumed to be for the benefit of the grantee, and therefore, till disagreement is shown, the law presumes that it had the consent of the grantee, even though the grantee be an idiot, lunatic, or infant. Coverture is no longer a disability.

Digby's History of the Law of Real Property, 5th edit. 405; 45 & 46 Vict. c. 75.

[2] *Molton* v. *Camroux*, 4 Exch. 17; 18 L. J. Exch. 356, Exch. Ch.

Idiots.—If the grant is perfectly fair and for the benefit of such persons, it will be upheld.[1]

If the grantee on becoming free from his disability disclaims, the grant is finally avoided, but formal assent is not necessary to render it valid.[2]

Implied Grants.

§ **150.** An implied grant always arises as an incident of an express grant, apart from which the question of capacity cannot arise in respect to the implied grant.

Easements by Prescription.

§ **151.** The presumption of a grant having been made and lost may be raised in favour of a person who at the time at which the grant is presumed to have been made was under a legal disability, such as idiotcy, lunacy, or infancy.[3]

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[1] *Molton* v. *Camroux*, 4 Exch. 17; 18 L. J. Exch. 356, Exch. Ch.

[2] See Smith's Law of Real and Personal Property, p. 1321, § 3294, 6th edition. Digby's History of the Law of Real Property, 5th edition, p. 405.

[3] Because a valid grant might be made in favour of a person so circumstanced, Digby, 5th edition, 405.

OF THE CAPACITY TO GRANT AN EASEMENT.

EXPRESS GRANTS.

§ **152.** An easement may be granted though the servient owner of the tenement was, at the time of the grant, under the legal disability of infancy,[1] provided that on becoming free from the disability the grantor may avoid the grant if it was to his disadvantage.

In gavelkind tenure an infant may alien by feoffment at the age of fifteen.[2]

A person cannot allege his own insanity to avoid a grant made by him when insane. But after his death his heir or other person interested may take advantage of his incapacity to avoid the grant.[3]

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[1] Smith's Law of Real and Personal Property, § 3302.

[2] Co. Litt. 171b, n. (5).

"A deed executed by an infant is voidable only and not void; "and *Zouch* v. *Parsons* (3 Burr. 1794) is sound law. A voidable "deed is valid until some act is done to avoid it." *Allen* v. *Allen* (1841), 2 Dru. & W. 307. Grants by lunatics or idiots who have not the requisite intelligence are void (Digby, 5th edition, 403); but "mental incapacity will not vacate a "contract if the incapacity be unknown to the other contracting "party, and no advantage have been taken of the incapable "person, especially if the contract has been executed, so that "the parties cannot be restored to their original position." *Molton* v. *Camroux* (1849) in error 4 Exch. 17; 18 L. J. Exch. 356, Exch. Ch.

[3] § 3341, Smith.

Implied Grants.

§ **153.** An implied grant always arises as an incident of an express grant, apart from which the question of capacity cannot arise in respect to the implied grant.

Easements by Prescription.

§ **154.** A presumption of a grant having been made and lost cannot be raised to the prejudice of a servient owner who, at the time at which the grant would be presumed to have been made, was incapable of consenting to it.

Exception.—This rule does not apply to easements of light acquired under the Prescription Act.[1] See § 34, *ante.*

Illustrations.

(*a.*) A has had an immemorial user of an easement over the tenement of B, and claims to prescribe at common law.

B is shown to have been incapable of consenting to the making of a grant by reason of lunacy or minority 25 years prior to the suit, and it is not shown when his incapacity commenced. He may, therefore, have been incapable at any part of the period of user. The presumption of his having made a grant cannot therefore arise.

(*b.*) A has had immemorial user of an easement over the tenement of B, and claims to prescribe at common law. It is

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[1] *Tapling* v. *Jones*, 11 H. L. Cas. 290, 304; 34 L. J. C. P. 342. *Jordeson* v. *Sutton, Southcoates & Drypool Gas Co.*, (1898) 2 Ch. 614; 67 L. J. Ch. 666.

shown that B was, 25 years prior to suit, incapable from lunacy of consenting to the making of a grant. But it is shown that his incapacity commenced 25 years prior to the suit.

Immemorial user being shown, a grant may be presumed, as the circumstances warrant the supposition that a grant may have been made by B or by his predecessors at a date prior to the commencement of the incapacity.

(*c.*) A has had 20 years' enjoyment as of right of an easement over the tenement of B, and claims to prescribe under the Prescription Act. It is shown that at the commencement of the 20 years B was an infant.

This, except in a case of an easement of light, rebuts the presumption of a grant at the commencement of the 20 years, because B was then incapable of consenting to the making of the grant.

§ **155.** In the case of an easement of light, the period of 20 years' actual enjoyment, without interruption, is sufficient by prescription under the Act to enable the dominant owner to acquire the easement, irrespective of the capacity of the servient owner.[1]

§ **156.** If, at the point of time at which it is presumed that the grant was made, the servient owner, or those through whom his right is derived, were capable of making a grant, no subsequent incapacity of such persons can rebut the presumption of a grant; though intermediate incapacity renders the claim subject to deduction from the period of enjoyment.[2]

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[1] *Jordeson* v. *Sutton, Southcoates & Drypool Gas Co.*, (1898) 2 Ch. 614; 67 L. J. Ch. 666.

[2] See § 38, *ante*.

Illustrations.

(*a.*) A has had several years' enjoyment of an easement as of right over the tenement of B, and claims a right to the easement under the Prescription Act.

It is shown that for the period of 10 years, commencing 5 years after the commencement of the period of enjoyment, and ending 15 years before its termination, B was insane. As, however, at the commencement of the period of enjoyment, being the point at which the grant is presumed to have been made, B was capable of consenting to the making of a grant, the presumption of a grant is not rebutted by B's subsequent incapacity; but the period of 10 years is excluded from the computation.

(*b.*) B's father, C, whose heir B is, and B, after C's death, have suffered an enjoyment by A of an easement over their tenement for over 20 years in the whole. C at the commencement of the period was capable of consenting to the making of a grant. B was an infant at C's death, which took place 2 years after the commencement of the period.

The subsequent incapacity on the part of the servient owner does not affect the presumption of C having made a grant in favour of A at the commencement of the period of over 20 years; but the period of the infancy of B is excluded from the computation.

§ **157.** A grant cannot be presumed if the circumstances are such that the servient owner, though capable of making a grant of the right of easement, has been incapable of resisting the user, unless there are other circumstances showing that he afterwards consented to the user.

Exception.—This does not apply to an easement of light acquired under the Prescription Act.

Illustrations.

(*a.*) B, a servient owner, leases his tenement to C. A, the owner of a neighbouring tenement, exercises a right of easement over B's tenement after it is leased to C.

The tenement being leased to C, B has no means of obstructing A's user of the easement.

A grant by B to A cannot be presumed.

(*b.*) In the same circumstances, after the expiry of the lease, B, having notice of the user by A, renews the lease to C without taking any steps, or requiring C to take any steps, to resist the user by A.

Here, as B had the opportunity to resist the exercise of the user by A and did not do so, he may be presumed to have consented to it, and the period of user during the first and renewed tenancies may be reckoned towards the period of enjoyment required to raise the presumption of a grant.

§ **158.** A grant cannot be presumed of a right of easement which has been enjoyed without the knowledge of the servient owner.

Exception.—This does not apply to the case of light so enjoyed, if the easement is claimed under the Prescription Act.

Illustration.

A has for 20 years enjoyed an easement of light passing to his tenement from that of B.

B has been unaware of the enjoyment. His ignorance of the enjoyment of the easement by A does not prevent the acquisition of the right of easement from B.

OF LICENSES.

§ **159.** A license is a privilege which a person, independently of any tenement of which he is owner or of which he is possessed, obtains from the owner of a tenement in respect of the use of that tenement, either occasionally or for a definite temporary purpose.[1]

A license as to personal things is a grant or a loan.

Illustrations.

A grants to B a license to hunt in A's ground and to carry away deer. Here the permission to hunt on the ground is a license. The permission to carry away deer is a grant of the deer.[2]

A permits B to take a wheel-barrow so many days a week from A's ground. This is a loan.

A in agreement with B erects a hoarding and uses a wall of a house belonging to B for advertising purposes, at a rental of

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[1] See *Hastings* v. *North Eastern Ry. Co.*, (1898) 2 Ch. 674; 67 L. J. Ch. 590, as to the distinction between an interest which is a mere license and one which is an incorporeal hereditament.

[2] *Thomas* v. *Sorrell*, Vaughan, 351.
See *Wood* v. *Leadbitter*, 13 M. & W. 838;
& 14 L. J. Exch. 161.

10*l.* per annum payable quarterly. This is a license—not a tenancy.[1]

A, a lessee, who is under a covenant not to assign or sublet "the premises," without the lessor's consent, gives B permission under an agreement to fish on the premises for the unexpired portion of the term under certain restrictions. This is not an assignment or under-letting. It is a mere license.[2]

§ **160.** A license may be granted by parol.

§ **161.** A license by parol is void where its effect, if valid, would be to convey an easement.[3] Such a license, to be valid, must be by grant express or implied.[4]

§ **162.** A parol license, though executed, is countermandable.

Exception 1.—A parol license if executed cannot be countermanded in cases where the effect of it is to authorize the grantee, by doing something on his own land, to abridge or extinguish an easement hitherto possessed by the grantor over the land of the grantee.

Exception 2.—A parol license is not counter-

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[1] *Wilson* v. *Taverner*, (1901) 1 Ch. 578; 70 L. J. Ch. 263; 84 L. T. 48.

[2] *Grove* v. *Portal*, (1902) 1 Ch. 727; 71 L. J. Ch. 299.

[3] *Hewlins* v. *Shippam*, 5 B. & C. 221; & 4 L. J. K. B. 241. *Cocker* v. *Cowper*, 1 C. M. & R. 418; 5 Tyrr. 103. *Fentiman* v. *Smith*, 4 East, 107.

[4] *Wood* v. *Leadbitter*, *supra*.

mandable if it is coupled with a grant of an interest.[1]

Illustrations to Exception 1.

(*a*1.) A, by license of B, erects in A's premises a weir in a stream at a point above B's mill, to which the water had been accustomed to flow, and thus diminishes the advantage which B had of right and by way of easement enjoyed in the use of the water of the stream. The license is irrevocable.[2]

(*a*2.) A, by license of B, by a permanent structure encloses on A's own ground, with B's consent, an area through which B has a right to receive, and has been accustomed to receive, light and air. In consequence of the enclosure B receives no light or air by the area. The license is irrevocable.[3]

Illustrations to Exception 2.

(*b*.) A gives permission to B to stack hay on A's land and carry it away.

This license is not revocable till B has had a reasonable time to stack and carry away the hay.[4]

In the same circumstances A, after giving the permission, sells the land to C. A's rights to possession of the land on which he had given B permission to stack the hay having ceased, the license ceases.[5]

(*c*.) A's hay was seized by his landlord as a distress for rent and sold, the conditions of sale being that the purchaser, B,

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[1] It is then to be regarded as putting the grantee in possession of the interest so granted for the term of the license or for a reasonable term, but not for longer than the right to possession of the place in or upon which the interest is granted remains in the grantor.

[2] *Liggins* v. *Inge*, 7 Bing. 682; 9 L. J. C. P. 202.

[3] *Winter* v. *Brockwell*, 8 East, 309.

[4] *Webb* v. *Paternoster*, 2 Roll. Rep. 143, 152.

[5] *Plummer* v. *Webb*, Noy's Rep. 98.

might come on A's ground from time to time to remove the hay. A assented to this. B removed some of the hay and then A locked the gate. B broke open the gate. The license given by A being irrevocable, A cannot recover damages from B.[1]

(*d.*) A authorizes B to dig for tin in A's property and to dispose of the tin on certain terms for 21 years.

A has granted an irrevocable license during 21 years to take the ore which shall be found.[2]

(*e.*) A grants B a license to hunt on his land and take away game. This is a grant of the game with a license to come and carry it away. The license is not revocable until it has been executed for a reasonable period.

The words "coupled with a grant of an interest," in Exception 2, mean "coupled with such a valid grant of an interest as may be made by parol,"[3] but do not include an interest which may only be granted by deed.

Illustrations.

(*a.*) A, without deed, permits B to come on his land and make a water-course to flow on B's land. There being here no valid grant of the water-course, which can only be granted by deed, the permission, though coupled with an interest, is a mere license, and as such revocable.[4]

(*b.*) A grants B permission to hunt or shoot on his land, but does not grant him permission to carry away game; as the parol

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[1] *Wood* v. *Manley*, 11 Ad. & E. 30; 9 L. J. N. S. Q. B. 27.

[2] *Doe* v. *Wood*, 2 B. & Ald. 738.

[3] As an interest in stacking hay, removing hay, digging for ore, and taking game.

[4] Case put in *Wood* v. *Leadbitter*, 14 L. J. Exch. 165; 13 M. & W. 838.

grant to use the land for hunting or shooting does not convey any valid interest in the land, the permission is a mere license and revocable.[1]

§ **163.** A parol license, though executed, and even though valuable consideration may have been given for it, is countermandable in other cases.

Illustrations.

A issues tickets, at one guinea each, permitting the holders to come on his enclosure to witness some races. B becomes the holder of one of these tickets, for which he has paid one guinea. A may at any time revoke the permission to enter and be on the enclosure, and may turn B out of it.[2]

A, under the license of B, built a cottage on the waste ground of B and lived in it for a year and a half. Held, that the license was revocable.[3]

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[1] Case put in *Wood* v. *Leadbitter*,
14 L. J. Exch. 165; 13 M. & W. 838.

[2] *Wood* v. *Leadbitter*, and the cases cited in it, 13 M. & W. 838;
Viz., *Webb* v. *Paternoster*. 14 L. J. Exch. 161.
Wood v. *Lake*.
Wood v. *Manley*, and *Taylor* v. *Waters*, which it overruled.
But *Wood* v. *Leadbitter* has been questioned in *Lowe* v. *Adams*, (1901) 2 Ch. 598; 70 L. J. Ch. 783, *q. v.*

[3] *The King* v. *The Inhabitants of Horndon-on-the-Hill*,
4 M. & S. 562.
From this last case it will be seen that the license is still countermandable even when the thing erected is of a permanent character and on the land of the licensor. To have held otherwise would have been in effect to recognize a valid grant of the land. A grant of land to be valid must be by deed and not by parol.

INDEX.

PAGE

ABANDONMENT,
Extinguishment of easement by . . . . 98—101

ABATEMENT
of nuisance 106, 107

ACQUISITION,
Modes of 2, 3
Where there can be no . 5, 7, 9, 22, 23, 25, 26, 27, 41, 44, 46, 80, 102

ACT
of the dominant owner, Extinguishment of easements by necessary consequence of 98

ACTION
necessary to acquisition of easement under Prescription Act 26
for disturbance of right of Support 71
for damages for injury in respect of public right of way, will not lie . . . . . 90, n.
for injury in respect of private right . . . 90, 91, n.

ACTUAL
enjoyment, Meaning of . . . . . 34, 47, n.

AIR,
uninterrupted flow of, from adjoining tenement, No natural right to 67
Right to receive, vertically 67
Right to enjoy freely what comes laterally or vertically 67
pollution of, Right to freedom from 67

PAGE

AIR—*continued.*
unpolluted, Definition of 67
Qualifications of rights in 67, 68
Rights of easements in 68
uninterrupted flow 68
Pollution of air 69

ALTERATION
of mode of enjoyment, Extinguishment of easement by . . . . . 95—97

ANNOYANCES OR NUISANCES 103

ARTIFICIAL STREAM . . . . . 51, 52, n.
Rights of a person in possession of an . . . 52, n.
Natural right in . . . . . 48, n., 51
What rules as to natural streams not applicable to . 51
In what case a right to an easement of uninterrupted flow may be acquired in an 55
if permanent 55, 56
if temporary 56
Against whom it may be acquired when the stream is permanent 56
when temporary 56
Easements of damming up and diverting . . . 57
Easements of polluting 58

"AS OF RIGHT AND WITHOUT INTERRUPTION,"
In what cases enjoyment must be shown to have been . 34

ASCERTAINED,
Way of necessity cannot be altered when once . . 65

ASSENT
or dissent to grant by grantee when free from disability, Effect of 110

BUILDINGS,
support of, by soil, No right to, except as an easement 72
support of, by buildings, Right to, may arise on severance of tenements 73

PAGE

BUILDINGS—*continued.*
Support of ancient, by one built by another builder contiguously 73
Though no right of support exists, care in removal required 74

CAPACITY
to acquire an easement 109
Question of, in respect to implied grants . . . 110
In the case of prescription 110
to grant an easement 111
by express grant 111
by implied grant 112
Acquisition of easement of light by Prescription, independent of 112, 114, 115

CARE,
Duty of, in removing a contiguous building . . 74

CESSATION
of necessity, Extinguishment of easements by . . 94

CLAIM
under the Prescription Act, not sustainable on an enjoyment short of twenty years 34, 41

COMMON LAW,
Prescription at 21

COMPUTATION
of time, exclusion of periods of disability . . 41, 46

CONSENT,
express or implied, necessary to validity of acquisition of grant 109

CONTIGUOUS
building, Obligation of care in removal of . . . 74

CONTINUANCE
of obstruction to a natural right by a person who did not commence it, his liability 106

PAGE

CONTRIBUTION
by owner to subsidence of buildings, does not give claim to more support 74

CONVENIENCES
used and enjoyed before severance between the two portions of a severed tenement—when they pass as appurtenant to the tenement sold . 12—20, 62—65

CORPORATION, A,
is a person 7

"COUPLED WITH THE GRANT OF AN INTEREST,"
Meaning of 119

DAMAGE, SPECIAL,
unnecessary to be shown to sustain an action for obstruction or disturbance of natural right or easement 106

DAMMING
up a stream by an upper riparian proprietor, or by a lower riparian proprietor, a violation of what right 50, 51

DEFEATED,
How the right to an easement under the Prescription Act through enjoyment of twenty years may be, and how it cannot be . . . . . 35—38, 44—47
How claims, except those to light, liable to be, notwithstanding actual enjoyment for period required . 46—48

DEFINED STREAM,
Riparian owner's right limited to the 49
may be above ground or under ground . . . 49

DEFINITION
of servitudes, Profits *à prendre* and Easements . . 1, 2
of unpolluted air 67
of excessive exercise of enjoyment . . . 86, 87
of a license 116
of a stream (Lord Halsbury's) 59

PAGE

DEVIATION
from way in exercise of a private right of way, when authorized. 65, 66

DIFFERENT
route, when may be taken in exercise of a private right of way 66

DISABILITY,
Exclusion of periods of . . . . . 41—44
Grantee, when free from, may signify dissent to grant made. 109
Servient owner under a, at time of grant, may on becoming free from disability avoid grant . . . 111

DISTURBANCE
of natural rights and of easements . . . 102—108

DIVERSION OF WATER,
when not an injury to lower riparian proprietor . . 50

DIVERT WATER,
Easement of right to, how may be acquired . . . 57

DOMINANT TENEMENT,
what 3

DUTY OF CARE
in removal of a contiguous building 74
in getting rid of collections of water 53

EASEMENTS,
What servitudes are so called 1, 2
In what respects permanency required 2
Origin of 2, 3
Classification of 3, 4, 5
Certain conditions of 5, 6, 7
Quantum of interest in the servient tenement required in the person granting the easement 7
Tenant cannot acquire, over neighbouring tenement . 7
except an easement of light 7
view of Irish Courts as to this . . . 7, n.
Who may acquire 7, 8

PAGE

EASEMENTS—*continued.*

Leaseholder may, in the case of light, acquire, against leaseholder 8
may not acquire, against landlord 9
by express grant 9
by implied grant, how they arise 10
cannot exist during unity of possession . . 10, 11
Quasi easements, what they are 10
Illustrations of 10, 11
may arise on severance of tenements out of dependence of parts . . . . . 12—20
What easements will be implied on severance of tenements . . . . . 12—14
Illustrations of . . . . . 15—20
by prescription . . . . . 20—48
by prescription at Common Law . . . . . 21—26
by prescription under the Prescription Act . . 26—48
which can be acquired under the Prescription Act . 27
When cannot be acquired 44, 85
of WATER, what kind of streams they may be acquired in 54
of uninterrupted flow in a permanent artificial stream . 55
Against whom they may be acquired 56
to obstruct or divert water 57
to pollute water 58
of WAY, how may be acquired . . . . . 59—64
Right to acquire, and right to, how qualified . 64—66
in AIR . . . . . 67—69
of SUPPORT . . . . . 72—74
of LIGHT, can only be claimed as appurtenant to buildings . . . . . 25, 75—80
of light by implied grant, when they arise . . . 76
Extinguishment of 89
by Act of Parliament 89
by express release, how effected 91
by merger by union of two or more tenements in one owner 91
do not become dormant or latent by union, but are extinguished 92
are not *revived* by subsequent severance, but arise *newly* 92

PAGE

EASEMENTS—*continued.*

extinguished by cessation of purpose 94
of necessity . . . 94, 95
Extinguishment of, by alteration of mode of enjoyment . . . . . 95—97
Extinguishment of, by necessary consequence of act of the dominant owner 98
Extinguishment of, by abandonment 98
of light, Abandonment of, what circumstances afford evidence of abandonment . . . . . 98—101
Estoppel of dominant owner in certain cases . . 100
Disturbance of . . . . . 102—108
Capacity to accept or to grant an easement . . 109, 111

EFFECT

of public right of way coming into existence over a way privately enjoyed by way of easement . . . 66
of showing that right claimed under the Prescription Act was first enjoyed at a date prior to the period of twenty years, but within the period of legal memory 35

ENHANCEMENT

of obligation of support does not arise in favour of one who has contributed to the subsidence of his buildings 74

ENJOYMENT

of air received, Right to 67
of twenty years, What may be presumed after . . 21
to qualify for acquisition of prescriptive right at common law, Character of 26
for twenty years, necessary to sustain a claim under the Prescription Act 34
In what cases, must have been as of right and without interruption 34
of light without interruption for twenty years, confers absolute right to easement under the Prescription Act 38

PAGE

ENJOYMENT—*continued.*
Right of dominant owner to do all that is necessary for full and free exercise of 89
Extinguishment of easements by alteration of mode of . . . . . 95—97

ENTRY
to private easement of way, At what point, may be made 61

ERECTIONS,
Offensive, in obstruction of natural rights or rights of easement 104

ESTOPPEL
of dominant owner in certain cases 100

EXCESSIVE
exercise of enjoyment, When servient owner has a right to obstruct 86
Extent to which he may obstruct 86
"excessive enjoyment," Meaning of 86, 87

EXCLUSION
of periods of disability and life interests and terms of years . . . . . 41—46

EXPRESS GRANT,
Easements by 2, 3, 6, 9
Easements of water may be acquired by, over streams or collections of water of all kinds 54
Acquisition of right of way by, how made . . . 62

EXPRESS RELEASE,
Extinguishment of easements by 91

EXTENT OF RIGHT,
How determined in case of grant by deed . . . 81
If granted for general purposes, cannot be restricted to particular purposes, except in certain cases . . 82

PAGE

EXTENT OF RIGHT—*continued.*
when a grant is at variance wholly or partially with an Act of Parliament 80
On severance of tenements by dominant owner among several vendees with reservation of a portion to himself, what the criterion of distribution of the easement 82, 83
Obligation of servient owner in respect of a right of way 83

EXTENT OF USER,
Obligation of dominant owner 83
When easement acquired by prescription, accustomed user must determine 83
its exercise, how limited 83, 84
to pollute a stream existing at the commencement of the period, is the measure of degree of pollution permissible . . . . . 84, n.
Effect, when original, cannot be measured . . . 85
in the case of light. Alteration in modes of receiving the light 80
Where it is in excess, servient owner has a right to obstruct, on his own grounds 86

EXTINGUISHMENT OF EASEMENTS . . . . 89—101
by express release, how effected 91
by merger by union of two or more tenements in one owner 91
Exception 94
by cessation of purpose 94
by cessation of necessity 94
by alteration of mode of enjoyment . . . 95—97
by necessary consequence of act of the dominant owner 98
by abandonment 98
by licence 102

FLOOD WATER,
How may be disposed of 53

PAGE

FORTY
years' enjoyment, Effect of 38

GRANT,
Terms of, what must express 6
Presumption of, cannot be raised to prejudice of servient owner who was under a disability at presumable date of it 112
Exception in case of light 112
express, Easements by 2, 3, 9, 54, 62
Pre-requisite to validity of, as against grantee . . 109
implied, Easements by 10
how they arise 10
Question of capacity to take a 109
Presumption of, in favour of person claiming as dominant owner who was under a disability at presumable date of it 110

GRANTEE,
when free from disability, may signify his dissent . 110
Dissent so signified, finally avoids the grant . . 110

HIGHWAY,
Right of owner of land adjoining 60

HOLDERS OF LEASEHOLDS,
their capacity to acquire easements of light . . . 8
Extent of their right 8

IGNORANCE
of servient owner as to user, Effect of . . 22, 36, 115
Exception as to light 36, 38, 79, 115

IMMEMORIAL USAGE,
What is sufficient evidence of 21

PAGE

IMPLIED GRANT,
Easements by, how they arise 10
Easements of support by 73
Easements of light, in what circumstances arising by . 76
Question of capacity in respect of 110

INCAPACITY
to resist user, Effect of 114
Exception in the case of light 114

INCIDENTS OF EASEMENTS,
Obligation to repair 88
(1) If damage arise to the servient owner by reason of non-repair of artificial works through which enjoyment is had, liability of dominant owner 88
(2) If damage arises from natural causes only 88, 89

INHABITANTS
of a village, not a person 7

INTENTION
of vendor on severance when expressed by an act, but not in writing, how it may affect acquisition of easement 14

INTERDEPENDENCE,
reciprocal, of houses 14

INTEREST,
Grant of an 117, 118
"coupled with grant of an," Meaning of . . 119

INTERRUPTION,
Without, meaning of 34, 35
under the Act, What is not an . . . 26, 35, 39
What term of, required to constitute interruption under the Act 35
must be submitted to or acquiesced in during that term 35
How submission to, may be negatived 35

PAGE

KNOWLEDGE
of enjoyment by servient owner not necessary to the acquisition by dominant owner of an easement of light by prescription 36, 79

LATERALLY,
Right to receive light, not a natural right . . . 74

LEASEHOLDS,
Holders of, their capacity to acquire easements of light . 8, 9
extent of their right 8

LICENSE,
Extinguishment of an easement by 102
Definition of a 116
as to personal things, what it amounts to . . . 116
How, may be granted 117
Parol, when void 117
When not countermandable . . . . . 117—119

LIFE INTERESTS,
Exclusion of. 41

LIGHT,
Easements of, rights of holders of leaseholds in respect of 8, 9
"access of," meaning 40
Right to receive vertically a natural right . . . 74
Right to receive light laterally, not a natural right . 75
What the easement of light consists in 75
Easements of, by implied grant, how they arise . . 76
Term of enjoyment necessary to confer a prescriptive right to an easement of 38, 73
Amount of light to which the right is limited . . 78
Easement of, can only be claimed as appurtenant to buildings 25

LIGHT—*continued.*

PAGE

Right to, under the Prescription Act, absolute after twenty years' uninterrupted enjoyment . . 38, 39
What circumstances afford evidence of abandonment of easement of . . . . . 99—101

LIMIT
of natural right to support of soil 70

MEANING
of "actual enjoyment" 34, 37
"excessive enjoyment" 86
"coupled with grant of an interest" . . . 119

MERGER,
Extinguishment of easements by . . . . . 91—94

NAME,
Claim to an easement under the Prescription Act may be made, in whose 34

NATURAL RIGHT
to receive light vertically 74

NATURAL RIGHTS
are never extinguished: may be suspended and revived 92
Disturbance of 102

NATURAL STREAM,
Extent of property of riparian proprietor in water of a 48, 49

NATURAL STREAMS,
Purity of 52

NECESSITY,
Easements of, and illustrations . . . 13, 14, 17—19
Way of, when impliedly granted . . . . 63—65

PAGE

NECESSITY—*continued.*
Way of, will not be implied through tenement of a stranger 64
Way of, one who has acquired, may take the most convenient way 65
Way of, once ascertained cannot be altered . . . 65
Exception 65, 66
cessation of, Extinguishment of easements by . 94

NUISANCE,
To what the term is applied 103, 104
Suitability of place cannot legalize a 104

NUISANCES,
The right to commit, is an easement 102

OBLIGATION
of support, what it consists in 70, 71
of care in removal of contiguous buildings . . . 73
as to offensive erections 104
to repair that on which the enjoyment depends . . 88

OBSTRUCT EASEMENT,
When servient owner's right to, arises 86
Extent to which he may 86
must obstruct only in his own ground . . . 87

OBSTRUCT WATER,
How easement of right to, may be acquired . . . 57

OBSTRUCTION
of enjoyment of easement, in what case may be effected by servient owner 87
of easements, what amounts to 105
to a natural right or easement includes a continuance of the obstruction 106
of natural right or easement, actionable without special damage 106

PAGE

OFFENSIVE ERECTIONS 104

OWNER, RIPARIAN,
his rights in water . . . . . 48—59

PARISHIONERS
not a "person" 7, 8

PAROL LICENSE,
when void 117
when not countermandable . . . . 117—119
when countermandable. 120

PERSON,
An easement can only be acquired by a . . . 7
Who is a, for the purpose of acquiring an easement . 7

PLACE,
Suitability of, cannot legalize a nuisance . . . 104

PLACING
anything offensive near the property of another, how regarded 104

POLLUTE WATER,
Easement of right to, how may be acquired. . . 58
When the time begins to run towards the acquisition of the right to 58

POLLUTION OF AIR,
Right to freedom from 67

PRE-REQUISITES to the acquisition of easement under the Prescription Act:
(1) The bringing an action 26
(2) The susceptibility of the enjoyment to interruption 45
(3) The capacity of servient owner at the commencement of the period of twenty years . . 46, 47

PAGE

PRE-REQUISITES, &c.—*continued.*
(4) The possibility of measuring definitely the extent at the period of commencement of an user which has since gradually increased 85
PRE-REQUISITE to the acquisition of an easement under section 2:
(5) Actual enjoyment by some person claiming right thereto 47
As to (2)—(5), exceptions in the case of light 36, 45, 46

PRESCRIPTION,
Easements of water may be acquired by, over defined streams only, and permanent collections of water . 25
Easements by . . . . . 21—48
at common law, what is 21

PRESCRIPTION ACT 26
Pre-requisites to acquisition of easement under . 26, 27, 28, 34, 44, 45, 84
Easements which can be acquired under . . . 27
Claim to an easement under, may be made in whose name 34
Easement acquired under, is acquired for benefit of the dominant tenement 34
Effect of showing that right claimed under, was first enjoyed at date prior to the period of twenty years, but within the period of legal memory . . . 35

PRESCRIPTIVE RIGHT
to an easement of light, Term of enjoyment necessary to confer 38
at common law, Cases in which, cannot be acquired . 22
Character of enjoyment to qualify for acquisition of . 26

PRESUMPTION
of enjoyment for twenty years or for forty years may not be raised from enjoyment for any less period . 41

PAGE

PRESUMPTION—*continued.*
of lost grant cannot be raised to prejudice of servient owner who was under a disability at presumable date of it 112
Exception in case of light 112, 113
of grant, No rebuttal of, by reason of incapacity arising subsequent to presumable date of grant . . . 113

PRIVATE RIGHTS OF WAY . . . . . 59—66
to whom they appertain 60
for what purposes 60
existing irrespective of a tenement are not easements . 60
may be usable generally for all purposes connected with passing to or from the tenement . . . 60
may be limited to a particular mode of user . . . 60
may be limited as to occasions of user 61

PRIVATE WAY,
Owner of easement of, where may enter upon . . 61
Use of a, to reach a highway 62
How easement of, may be acquired 62
how affected by acquisition of public right of way over the same ground 90

PROCEDURE,
available when right to support is being imperilled 71, n.

PROFITS *à prendre*,
What servitudes are so called 1

PROSPECT,
Right of, cannot be acquired as an easement . . 5

PUBLIC
rights of way, why not easements 59
right of way, Acquisition of, how it affects acquisition of private right of way over the same ground . . 66

PAGE

PURITY
of natural stream 52
of artificial stream: the person in possession of an artificial stream has a right to possess it in undiminished purity 52, 53

REASONABLE USE OF WATER,
Riparian owner's right limited to a 48
The question of what is a, not a question of law . . 49

RECIPROCAL INTERDEPENDENCE,
Easements of 14, 15, 16, 17, 18, 19

RELEASE, EXPRESS,
Extinguishment of easements by 91

REMEDY
for injury to public right of way, by indictment . . 90
by action . . . 90
Pre-requisite of right of action in such cases . . 90
for injury to private right of way, by action . . 91

RESISTANCE,
to user, effect of incapacity to make . 22—25, 41—46, 112
Exception as to light 38, 44, 112

REVERSIONER,
In what case right of action arises to, on disturbance of an Easement. 108

RIPARIAN OWNER, his rights
in water 48, 49
as to reasonable use of water 48
in natural defined streams 48
diminution of water 48
diversion of water 49
damming of water 50

PAGE

RIPARIAN OWNER—*continued.*
his right does not extend to water not running in a defined stream 51
can only grant user of water to another as against himself 54

SERVIENT TENEMENT,
what 3

SERVITUDE,
defined 1

SEVERANCE OF A TENEMENT,
What will be implied on 12, 13, 14
When intention of vendor is expressed by an Act inconsistent with the grant of a convenience theretofore used 14
On, express words not necessary to pass easements of necessity or continuous and apparent easements . 12, 13, 14
or other conveniences since the Conveyancing Act of 1881 . . . . . 20, n.
On, an existing right of way becomes appurtenant to each of the severed portions 63

STRANGER,
Right of way will not be implied through tenement of a 64

STREAMS,
Purity of natural 52, 53
artificial 52
Kinds of, in which easements may be acquired . . 54

SUBSIDENCE OF LAND WITH BUILDINGS,
Contribution to, by owner, how it affects right to support 74

PAGE

SUITABILITY
of place cannot legalize nuisance 104

SUPPORT
of buildings by soil, no right to, except as an easement 72
Right to, may arise on severance of tenements—
(a) By original disposition of tenements by a single owner in necessary dependence . . . 73
(b) By acquisition of the right, by lapse of time, in the case of two tenements built contiguously by separate owners 73, 74

SUPPORT OF SOIL 70, 71
Conditions of right to 70
Limit of right to 70
Obligation of 71
Right to, how affected by erection of buildings . . 71
Action for disturbance 71

SURFACE WATER,
How may be disposed of 53
Right to appropriate 53, 54

TENANT,
cannot acquire easement against his landlord . . 9
can acquire easement of light against other tenants . 8
His liability for obstructing light 80

TERM
of enjoyment necessary to confer a prescriptive right to an easement of light 38, 39

TWENTY
years' uninterrupted enjoyment may raise presumption of a grant having been made and lost . . . 21
years' enjoyment necessary to sustain a claim under the Prescription Act 34

PAGE

UNINTERRUPTED FLOW,
Easement of, in artificial streams 54

USAGE,
What is sufficient evidence of immemorial . . . 21

USE
of an easement of way must involve the purpose of passing and repassing to and from a tenement . . 60
of an easement of way to reach a highway . . . 60

USER, MODE OF,
Effect of ignorance of servient owner as to . . . 115
Exception as to light 115

VERTICALLY,
Right to receive air, a natural right 67
Right to receive light, a natural right 74

VILLAGE,
Inhabitants of a, not a person 7, 8

WATER,
Natural rights in . . . . . 48—54
In what kind of streams easement of, may be acquired 54
Surface, how may be disposed of 53, 54

WAY,
What are public rights of 59
Why public rights of, are not easements . . . 59
Right of, on severance of tenements 63
Obligation of servient owner in respect of a right of . 83
Private rights of, what they are 59
of necessity once ascertained cannot be altered . . 65
exception 65, 66

PAGE

WAY—*continued.*

Private right of, how affected by subsequent acquisition of public right over the same ground . . 90

Remedies for injury in respect of right of,

where public right . . . . . 90, n.

where private right . . . . . 90, n.

WAYS,

Rights of easement in . . . . . 59—66

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